TOWARD NEW NONPROFIT LEGISLATION

REPORT OF THE TASK FORCE
ON THE
VOLUNTEER INCORPORATIONS ACT

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The Task Force on the Volunteer Incorporations Act is pleased to present its final report *Toward New Nonprofit Legislation*, to the Honourable Dennis Anderson, Minister of Consumer and Corporate Affairs, Province of Alberta.

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VOLUNTEER INCORPORATIONS ACT TASK FORCE

The Volunteer Incorporations Act Task Force was appointed in July of 1988 by the then Minister of Consumer and Corporate Affairs, the Honourable Elaine McCoy, for the purpose of reviewing Bill 54, the Volunteer Incorporations Act.

The members of the Task Force are Gwen Harris, Chairman (Edmonton), Joan Riddle (Edmonton), Christine Henderson (Grande Prairie), Duane Skaley (Red Deer), Sonia Eisler (Calgary), Rob Hainsworth (Calgary), and Kelly Byers (Medicine Hat).

ACKNOWLEDGEMENTS

The Task Force acknowledges the significant input of the many members of Alberta's nonprofit community who contributed their time and ideas to the review of Bill 54. The recommendations contained in this report arose from the many valuable comments and suggestions made to the Task Force at the public meetings, during the field tests, and in the written submissions.

The Task Force is also indebted to Mr. W.W. Proskiw, the Registrar of Corporations, and his staff who provided the Task Force with support and assistance throughout the 18 months of its tenure.

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Companies Act, R.S.A. 1980, c. C-20	Companies Act or A.C.A.
Public Contributions Act, R.S.A. 1980, c. P-26	Public Contributions Act or P.C.A.
Societies Act, R.S.A. 1980, c. S-18	Societies Act or S.A.
Volunteer Incorporations Act, 1987, Bill 54, Second Session, 21st Legislature 36 Elizabeth II	V.I.A. or Bill 54

EXECUTIVE SUMMARY

The Volunteer Incorporations Act Task Force was established in July of 1988 to review the proposed Volunteer Incorporations Act, to solicit public input on it, and to make recommendations about the form and content of the legislation, as well as the implementation of the legislation once passed. The purpose of this Report is to advise the Minister of Consumer and Corporate Affairs of the Task Force's findings and recommendations.

Current Alberta Law

Nonprofit organizations in Alberta are primarily governed by the Societies Act, the Companies Act, and where they are silent, by the common law. Bill 54, the Volunteer Incorporations Act, was introduced to modernize the existing law, parts of which date back to the early 1900's, and to provide certainty where the existing law is unclear, incomplete, and inadequate for the needs of present day nonprofit organizations.

The Task

The nonprofit sector is a unique, valuable, and diverse sector in Alberta. In reviewing the legislation the Task Force was ever mindful of the sector's nature and cognizant of the need for legislation which would provide for the varying levels of sophistication within the sector. The legislation must be both sophisticated and simple - it must be comprehensive enough for the larger nonprofits with complex corporate

needs and simple enough for the smaller nonprofits with limited corporate needs.

Conclusion

After meeting with, hearing from, and speaking with a great number of representatives from a wide variety of Alberta's nonprofit organizations, the Task Force is of the view that the approach adopted in Bill 54 is valid and valuable. There were a number of problem areas identified and recommendations have been included in this Report for changes to those areas. In the final result, the Task Force is convinced that the revised Bill is a necessary, positive, and usable development in the evolution of Alberta's law for nonprofits.

AN INTRODUCTION TO THE REPORT OF THE TASK FORCE ON THE VOLUNTEER INCORPORATIONS ACT

AN INTRODUCTION TO THE REPORT OF THE TASK FORCE ON THE VOLUNTEER INCORPORATIONS ACT

When the VIA Task Force was first appointed by the former Minister of Consumer and Corporate Affairs, the Honourable Elaine McCoy, its citizen members had their own impressions of Alberta's nonprofit sector based upon their individual involvement in their own communities. It was anticipated that this knowledge would be applied to the analysis of Bill 54, the proposed Volunteer Incorporations Act, and its impact on the entire provincial nonprofit sector. Although the Task Force members had their own views of the proposed statute, each member approached the appointed task with an open mind and an eagerness to learn more about the sector and the Bill which would govern the corporate aspects of that sector.

The mandate of the Task Force included:

1. reviewing the proposed legislation,
2. soliciting public input on the legislation,
3. recommending an appropriate form of legislation for the incorporation of nonprofit organizations, and
4. recommending strategies for communicating and implementing the new legislation.

Throughout the course of the ten public meetings and the five field tests, much was learned about the activities, operations, administration, needs and above all, the sophistication and importance of Alberta's nonprofit corporations.

The nonprofit community consists of thousands of organizations involved in a wide array of activities carried out by some of Alberta's most dedicated and talented people. While these organizations exhibit varying levels of organizational complexity, it is evident that Alberta's nonprofit organizations operate at a sophisticated level as demonstrated by the knowledge, skill, and expertise of those who made written and oral submissions. The public meetings, field tests, and written submissions demonstrated that the nonprofit sector is a significant participant in and contributor to Alberta's economy and social fabric. The representations made by those organizations provided the Task Force with the information needed to determine what in Bill 54 needs to be revised, and what should remain unchanged.

The manner in which Bill 54 was introduced to Albertans resulted in considerable confusion and concern. However, the Task Force process demonstrated that none of the problems perceived or defined are incapable of resolution. The Task Force was convinced that the nonprofit sector deserves a modern, complete corporate statute that will empower it to govern itself. The Task Force concluded that the proposed statute is sound and will be very effective with some conceptual revisions, some drafting modifications, and a well-organized and effectively delivered implementation strategy.

The first part of this Report contains the Task Force's recommendations regarding the content of Bill 54. The second part addresses the implementation of the proposed statute, and the third part contains a summary of issues which were not fully addressed during the hearing and field test process, but which merit further consideration.

PART I: RECOMMENDATIONS REGARDING CONTENT

RECOMMENDATIONS REGARDING CONTENT

The recommendations which follow are of three types. The first set pertains to matters which were identified by a number of groups as confusing or irrelevant. However, the Task Force found that much of the confusion and misunderstanding was based upon a lack of information which when provided, served to alleviate most of the concerns. In these matters the Task Force recommends that the Bill remain as drafted.

The second set of recommendations pertains to matters which were identified by the nonprofit sector as unworkable or impractical. In these matters the Task Force recommends revisions to Bill 54.

The third set of recommendations stems from the Task Force's recognition of the nonprofit sector's ability to determine its own needs, and its expertise and ingenuity in ascertaining the most effective way to meet those needs. In these matters the Task Force recommends that the mandatory provisions be changed to permissive provisions which give statutory authority for nonprofit corporations to make their own rules in their own by-laws.

In all cases the Task Force relied upon the following test to determine the validity of its recommendations:

Is the provision in question

1. fair,
2. practical, and
3. legally sound?

A. RECOMMENDATIONS FOR NO CHANGE TO BILL 54

1. The Need for New Legislation

The Task Force recommends that new legislation be enacted to govern nonprofit corporations in Alberta. Both the Societies Act and the Companies Act are regarded as outdated, incomplete, and insufficient for the needs of nonprofit corporations today and in the future. This is especially the case for those organizations with inadequate by-laws and limited resources for legal assistance. The Societies Act, in particular, offers little guidance with respect to the legal and corporate nature of nonprofit corporations. It is silent on a number of significant issues. For example, submissions indicated that many directors of nonprofit corporations were unaware of their fiduciary duties and of their legal standard of care when acting in their capacity as directors. Others were unaware of members' rights and remedies. It is evident that a statute is needed which clearly provides for all the salient legal and corporate features of nonprofit corporations. In short, a need was identified for new legislation to update the existing law, to encode the common law as it pertains to nonprofit corporations, and to "fill in the gaps" where the Societies Act and the Companies Act are silent. This is seen to be necessary not only for the nonprofit corporations which need to be informed about the law which pertains to them, but also for the lawyers who must provide advice about the law, the judges who must interpret and decide upon the law, and the government authorities who must administer the law.

RECOMMENDATION #1(i) That the Societies Act and the Companies Act be replaced with new legislation to govern nonprofit corporations in Alberta.

RECOMMENDATION #1(ii) That the new legislation take the form of the proposed Bill 54, the Volunteer Incorporations Act, with the revisions recommended in this Report.

2. The Purpose of the Legislation

The Task Force agrees conceptually with Bill 54 and recommends that the new legislation be an enabling statute with a limited regulatory function with respect to those nonprofit corporations which use public money. The regulatory controls should be in the form of a requirement for public disclosure of a nonprofit corporation's annual financial statements indicating the use to which public money has been put. A need for further regulatory control was not identified, it being recognized that further controls are properly provided for in other statutes at the provincial and federal levels. Nor was a need identified for regulatory controls over nonprofit corporations operating without public money.

RECOMMENDATION #2(i) That the new legislation be an enabling corporate statute with a limited regulatory function with respect to nonprofit corporations which use public money; and

RECOMMENDATION #2(ii) That the regulatory control be by way of a requirement for public disclosure of a nonprofit corporation's incorporating documents and annual financial statements.

3. The Form of the Legislation

The Task Force recommends that the new legislation be in a form like Bill 54 which does not differentiate between societies and nonprofit companies. It was agreed that the present distinction is largely illusory as many organizations which incorporate under the Societies Act fit the category "other useful purpose" and in reality would be more appropriately incorporated as nonprofit companies. Further, many of the fund-raising activities of societies are in the nature of a trade or business, and would again be more appropriately carried on by a nonprofit company under the Companies Act. Therefore, the elimination of the distinction between societies and nonprofit companies would simply be a reflection of reality, and would legitimatize the current activities of many societies.

RECOMMENDATION #3 That the new legislation follow Bill 54 and draw no distinction between the existing corporate structures of societies and nonprofit companies.

4. The Language of the Legislation

The Task Force recommends that the language of the legislation be clear, precise, and complete, as it is in Bill 54. Many representatives of nonprofit corporations expressed the concern that the language of Bill 54 is too complicated - that there is too much "legalese" in a statute which pertains to a community with limited resources for legal input. The Task Force considered the issue from two perspectives - the perspective of those who expressed the concern and those who drafted the Bill. Upon further discussion with those concerned about the nature of the language, it was determined that many of them had not made a serious attempt at reading and understanding the Bill. Rather, many had simply reacted to what they perceived was more law. In fact, Bill 54 is 90 pages shorter than the two pieces of legislation that presently govern Alberta's nonprofit corporations. Others who had read the Bill and still had some difficulty, were helped by the summaries and comparisons contained in the Bill 54 kit which was distributed by Corporate Registry. As a result, the Task Force determined that Bill 54 can be understood by the layman in its present form with the assistance of explanatory or interpretive material.

The Task Force also considered Bill 54 from the perspective of those who drafted it. Time was spent with a legislative drafter discussing the concept and use of plain language legislation. These discussions made it clear to the Task Force that Bill 54 was drafted in the style of plain language legislation, and while certain portions of the Bill were regarded as too complex by the representatives of some nonprofit corporations, the Task Force recognized that certain other factors should not be overlooked, including:

a) that legal certainty and precision cannot be compromised,

b) that total simplification is not possible in a statute which includes inherently complex legal concepts,

c) that statute-users who want the opportunity to participate in the legal system, have an attendant responsibility to familiarize themselves with the legal concepts within that system,

d) that Bill 54's audience is comprised not only of the layman, but also of legislators, lawyers, judges, and the administrators of the statute, and

e) that an effective implementation strategy which includes explanatory and interpretive materials will be especially useful in those areas which are conceptually difficult and not easily translated into plain English without an attendant loss of precision and certainty.

RECOMMENDATION #4 That the language of the new legislation be clear, precise, and complete, as it is in Bill 54.

5. The Use of the Business Corporations Act as a Model.

The Task Force recommends that the new legislation be based upon the Business Corporations Act in so far as it is appropriate and practical to do so. It was agreed that the internal and external activities and relationships necessitate a comprehensive framework within which nonprofit corporations can operate with certainty. It was further agreed that where the existing law regarding nonprofit corporations is incomplete and obsolete, those principles of business corporation law which can be properly adapted to the particular needs and practices of nonprofit corporations should be. The Business Corporations Act is a progressive piece of corporate legislation with concepts, terms, and a drafting style which would be useful to the nonprofit corporate community as well as the business community. In addition, the knowledge of one statute will be useful in obtaining knowledge of the other where there is consistency in concepts, terms, and drafting. This will be of assistance to the layman, to lawyers, to judges, and to legislative administrators.

RECOMMENDATION #5 That the new legislation follow the model of the Business Corporations Act in so far as it is appropriate and practical to do so.

6. The Fundamental Principles of Bill 54

a) The Right to Incorporate

The Task Force recommends that incorporation should be a right for nonprofit corporations in Alberta once the proper incorporating documents have been provided to Corporate Registry. The system of discretionary incorporation which currently exists under the Societies Act, but which has rarely been exercised, is an ineffective method of regulating nonprofit corporations and of protecting the public interest. Discretionary incorporation does not indicate social or government sanction of a nonprofit corporation, nor does it have any effect on the actual activities of nonprofit corporations once incorporated. The public interest can be more effectively protected by controlling actual as opposed to proposed activities. It is therefore recommended that nonprofit corporations have the right to incorporate without the approval of a government official.

RECOMMENDATION #6(i) That the principle of incorporation as of right provided for in Bill 54 be followed in the new legislation.

b) Limitations on Purposes

The Task Force recommends that restrictions or limits NOT be placed upon the purposes for which nonprofit corporations can be incorporated. Nonprofit corporations should be permitted to incorporate for and to pursue any lawful purpose, including the carrying on of a trade or business. Placing a limitation on purposes is not an effective way of protecting the public interest. The public interest can be protected in this context by simply requiring nonprofit corporations to disclose their purposes, as is done in Bill 54, so that those who donate money will be able to ascertain a given nonprofit corporation's intended area of activity.

RECOMMENDATION #6(ii) That Bill 54 be followed such that restrictions or limits NOT be placed upon the purposes for which nonprofit corporations can be incorporated, and that nonprofit corporations be permitted to incorporate for any lawful purpose, including the carrying on of a trade or business.

RECOMMENDATION #6(iii) That nonprofit corporations be required to state the purposes for which they are being incorporated, as is currently required in Bill 54.

c) One Person Incorporations

The Task Force recommends that one person incorporations, presently provided for in Bill 54, be provided for in the new legislation. It was recognized that the protection afforded by the requirement of more than one incorporator is largely illusory, and that the requirement of at least three directors for nonprofit corporations that solicit public money is a more effective method of protecting the public interest. It was also recognized that the concept of one person incorporations would be a significant advantage for umbrella organizations wishing to carry on diverse activities through a number of separate nonprofit corporations, or for individuals who neither wanted nor needed other incorporators in order to pursue their specific purposes.

RECOMMENDATION #6(iv) That the one person incorporations provided for in Bill 54, be provided for in the new legislation.

7. Members' Rights and Remedies

The Task Force recommends that the balance which has been reached in Bill 54 between the directors' responsibility and authority to manage the affairs of a nonprofit corporation and the members' rights to control the organization, be maintained. The field testing in particular demonstrated an understanding and acceptance of the concept of such a balance. However, some specific problems with respect to the application of some of the provisions were identified, and some changes have been recommended in Part B of this Report.

RECOMMENDATION #7 That the balance achieved in Bill 54 between the rights of members and the authority of directors be maintained in the new legislation.

8. Directors' Duties

The Task Force recommends that the duty and standard of care for directors of nonprofit corporations proposed in Bill 54 remain unchanged under the new legislation. The need for an encoded and objective standard was demonstrated to the Task Force at the hearings and field tests, and in the written submissions. In general, there was a lack of awareness of the existence of the legal duties of the directors of nonprofit corporations, as well as of the nature of those duties. Further, the subjective nature of the existing common law standard of care was generally regarded as unfair. However, several practical problems were identified with respect to some of the more specific provisions relating to directors, and recommendations for some change are made in Part B of this Report.

RECOMMENDATION #8 **That the duty and standard of care of directors provided for in Bill 54 be maintained in the new legislation.**

B. RECOMMENDATIONS FOR CHANGE TO BILL 54

1. The Name of the Legislation

The Task Force recommends that the name of the new legislation to govern nonprofit corporations be the Nonprofit Corporations Act. It was readily apparent that the proposed name, the Volunteer Incorporations Act, was inappropriate, misleading, and confusing. The nonprofit sector, while a significant user of volunteers, is also comprised of many nonprofit corporations which operate either with paid staff exclusively, or with a combination of paid staff and volunteers. Further, the proposed statute is a corporate statute. It speaks to the corporate aspects of nonprofit corporations, not to the employment status of the people who carry out the activities of those corporations. The proposed statute also reflects the nonprofit nature of the corporate entity. The Task Force agreed with the recommended policy of the Institute of Law Research and Reform to use a distinctive term which will give the information that the entity is incorporated, and which will distinguish it from a business corporation. The name Nonprofit Corporations Act is therefore accurate and informative - it very clearly describes the corporate and nonprofit nature of the entities which it governs. Similarly, the acronym "N.P.C." is both necessary and useful in alerting the public to the fact that the nonprofit organization using it is an incorporated entity with limited liability.

RECOMMENDATION #9(i) That the name of the new legislation to govern Alberta's nonprofit corporations be the Nonprofit Corporations Act.

RECOMMENDATION #9(ii) That nonprofit corporations use the acronym "N.P.C." after their corporate names, in the same way that business corporations use the abbreviation "Inc.".

RECOMMENDATION #9(iii) That all of Alberta's nonprofit corporations use the acronym "N.P.C.", including the existing nonprofit corporations which will continue under the new legislation from the Societies Act and the Companies Act, as well as all new incorporations under the new statute.

2. The Classification of Nonprofit Corporations

The Task Force recommends that the classification system proposed in Bill 54 be utilized as a way of distinguishing between nonprofit corporations which operate with public money and those which do not, i.e. soliciting and non-soliciting. Other classification schemes based on purposes, organizational type, or beneficiaries were considered. However, it was determined that a classification based on source of funding was the most meaningful and practical form of classification for Alberta's nonprofit corporations. In addition, the Task Force recommends that the category of prescribed soliciting organizations NOT be used. It was apparent that it would not be possible to define such a category in a way which was fair, practical, and legally sound given the diversity in the nonprofit sector.

RECOMMENDATION #10(i) That the classification scheme for nonprofit corporations proposed in Bill 54 be retained, such that nonprofit corporations will be classified on the basis of their source of funding i.e. soliciting or non-soliciting.

RECOMMENDATION #10(ii) That the proposed category of "prescribed soliciting associations" not be used in the new Nonprofit Corporations Act.

It was noted, however, that the definition of "soliciting" in Bill 54 was slightly problematic for two reasons. First, it was not clear whether it applied to money only or whether it was also intended to include donations in kind. Second, it was not clear whether the term applied to monies solicited, or to monies solicited and received. The Task Force determined that this was simply a question of drafting and could be easily remedied.

RECOMMENDATION #10(iii) That the definition of soliciting be clarified to indicate that "money" and "similar financial assistance" do not include gifts in kind, annual membership fees or dues, or fees for service, and further, that the term "solicited money" means money actually received.

3. Filing Requirements

The Task Force recommends that nonprofit corporations be required to file their by-laws, whether the by-laws are the prescribed by-laws provided in the Regulations, or by-laws drafted specifically for a given nonprofit corporation. The rationale for mandatory filing is that it would be of use in ensuring that all nonprofit corporations make a conscious choice in determining the content of their by-laws. It should be noted that if a nonprofit corporation chooses and registers the prescribed by-laws, subsequent government amendments to them would not automatically apply to adopted prescribed by-laws. Such amendments would have to be specifically adopted by way of a special resolution of the members of the nonprofit corporation.

RECOMMENDATION #11(i) That nonprofit corporations be required to file their by-laws with Corporate Registry, whether the by-laws are those prescribed in the Regulations, or those drafted specifically for the nonprofit corporation.

The Task Force further recommends that the time period for filing notices for changes of directors, of registered office, etc..., be changed from 15 days to 30 days, in order to provide a reasonable and consistent standard throughout the new legislation.

The Task Force also recommends that the filing dates for annual returns and annual financial statements be more conveniently coordinated with anniversary dates, fiscal year ends, and annual general meetings. Concerns were expressed to the Task Force about the inconvenient sequencing of the present filing requirements under the Societies Act.

RECOMMENDATION #11(ii) That the time period for filing notice for changes of directors, and of registered offices, etc., be changed from 15 days to 30 days.

RECOMMENDATION #11(iii) That there be a more convenient coordination between the filing dates for annual returns and the annual financial statements and the anniversary dates, fiscal year ends, and annual general meetings of nonprofit corporations.

4. Members' Rights and Remedies

The Task Force recommends that the phrase "rules of natural justice" in section 31(3) of Bill 54 be replaced with or followed by a list of the actual rules. It was apparent that the term "natural justice" is not well understood, and that a list of the rules themselves would be more easily comprehended.

RECOMMENDATION #12(i) That the phrase "rules of natural justice" in section 31(3) of Bill 54 be replaced with or followed by a list of the actual rules of natural justice.

The Task Force also recommends that the unanimous shareholders' agreement be made available to nonprofit corporations which have share capital. While it is likely that it would be used in only a limited number of circumstances, it should nevertheless be made available to those nonprofit corporations which could benefit by its use.

RECOMMENDATION #12(ii) That the unanimous shareholders' agreement be made available to nonprofit corporations incorporated with share capital.

5. Directors

The Task Force recommends that there be a provision for the appointment of as well as the election of directors. Many nonprofit corporations are required to have designated representatives from certain agencies on their boards, and these designates are usually appointed. It is therefore necessary that the authority to appoint directors be included in the new nonprofit corporations statute.

RECOMMENDATION #13(i) That there be a provision for the appointment of directors by an outside appointing authority if the by-laws so provide.

The Task Force further recommends that a provision similar to section 117(4) of the Business Corporations Act be included in the new nonprofit corporations statute. This would alleviate the potential conflict of interest problems for directors who were elected or appointed by a particular group, by permitting such directors to give special, but not exclusive, consideration to the interests of that group.

RECOMMENDATION #13(ii) That a provision similar to section 117(4) of the Business Corporations Act be included in the new nonprofit corporations statute in order to alleviate potential conflict of interest problems for the directors of nonprofit corporations.

6. Continuance

The Task Force recommends that the new nonprofit corporations statute be implemented by requiring formal continuance only for those existing societies and nonprofit companies which do not meet the incorporation requirements of the new legislation. This would be determined through the use of a checklist which would be sent to existing societies and nonprofit companies with their annual returns. Only those in default of any of the items on the checklist would be required to file formal continuance documents. Those not in default would be deemed to have been incorporated under the new legislation. The Task Force also recommends that this continuance procedure be staged over a period of 3 years, at a cost which would escalate annually from a starting cost of $0 during the first year. It is further recommended that a comprehensive support system be provided for nonprofit corporations to assist them in continuing under the nonprofit corporations statute.

The Task Force was alerted to this procedure of continuance-if-in-default by members of the nonprofit community who viewed it as a good opportunity for existing nonprofit corporations to revisit their purposes and reconsider the content of their by-laws. In most cases the people presently operating nonprofit corporations are not the same people who incorporated them, established their purposes, and drafted their by-laws. Many nonprofit corporations will therefore benefit by continuance.

RECOMMENDATION #14(i) That only those existing societies and nonprofit companies which are in default of the incorporation requirements of the new nonprofit corporations statute be required to file formal continuance documents with Corporate Registry.

RECOMMENDATION #14(ii) That the new nonprofit corporations statute be implemented over a 3 year period.

RECOMMENDATION #14(iii) That the cost of continuance escalate annually from a starting point of $0 for the first year.

RECOMMENDATION #14(iv) That a comprehensive support system be provided to assist nonprofit corporations in continuing under the nonprofit corporations statute.

The Task Force also recommends that provision be made to allow nonprofit corporations incorporated under the Business Corporations Act to continue under the nonprofit corporations statute. The Task Force became aware of a limited number of nonprofit corporations which, because of the limitations and deficiencies of the Societies Act and the Companies Act, incorporated under the Business Corporations Act.

RECOMMENDATION #14(v) **That nonprofit corporations presently incorporated under the Business Corporations Act be permitted to continue under the nonprofit corporations statute, provided they meet its requirements.**

7. Distribution Constraint

The Task Force recommends that section 78(2) of Bill 54 be revised in the new nonprofit corporations statute to more clearly accommodate the needs of those mutual benefit nonprofit corporations which provide financial assistance to their members through the payment of benefits, pensions, annuities, or the rendering of services in the event of death, accident, illness, or misfortune. Mutual benefit organizations have been providing this kind of financial assistance to their members since the Middle Ages. The revision suggested by the Task Force would simply allow this to continue.

RECOMMENDATION #15 **That section 78(2) of Bill 54 be revised to specifically authorize, where the articles so provide, the payment of benefits, pensions, annuities, or the rendering of services to its members in the event of death, accident, illness, or other misfortune.**

C. RECOMMENDATIONS FOR PERMISSIVE PROVISIONS ALLOWING CHOICE

1. Audit Requirements

The Task Force recommends that nonprofit corporations be allowed to establish their own standards for financial reporting and set this out in their by-laws. The nonprofit corporations statute should provide choices for financial reporting and should require nonprofit corporations to make a choice and include that choice in their by-laws. It was thought that the statute should not impose a higher standard than is required by a nonprofit corporation's funders (if a soliciting nonprofit corporation) or by its members (if non-soliciting). By providing a choice in the statute, a nonprofit corporation can choose a standard which is the same as that which is required by its funders or its members.

RECOMMENDATION #16(i) That the new nonprofit corporations statute require nonprofit corporations to choose their own standard of financial reporting and include that standard in their by-laws.

RECOMMENDATION #16(ii) That the choice of standards of financial reporting take the following form:

- **a) appoint an independent auditor to perform an audit,**
- **b) appoint an independent accountant to conduct a review engagement, or**
- **c) appoint a Financial Committee consisting of one or more independent persons or members to:**
    - **i) scrutinize the financial information, and supporting records, documents, books, accounts, and vouchers of the corporation,**

ii) obtain information and explanations from directors, officers, employees, agents, or former members of the Financial Committee, and

iii) communicate findings or conclusions to the members.

The Task Force also recommends that only nonprofit corporations which solicit money from the public be required to file annual financial statements with Corporate Registry. Nonprofit corporations which operate with their own money should not be required to account publicly for their money, there being no public interest to protect. All nonprofit corporations would be required to indicate on their annual return their status as soliciting or non-soliciting. Those indicating a status of soliciting would be required to file their annual financial statements according to the standard established in their by-laws.

RECOMMENDATION #16(iii) That only nonprofit corporations which solicit money from the public be required to publicly account for that money by filing their annual financial statements with Corporate Registry. Administratively this would be determined by requiring nonprofit corporations to indicate their status as soliciting or non-soliciting on their annual return.

The Task Force further recommends that non-soliciting nonprofit corporations be permitted to resolve not to prepare any annual financial statements, BUT only by unanimous resolution of the members. It was reasoned that members operating with their own money ought to be able to decide not only how to account for their money, but also whether to account for it at all. The Task Force also determined that the decision not to account for funds needs to be made each year.

RECOMMENDATION #16(iv) That nonprofit corporations which do not use public money be permitted to resolve unanimously not to account for the use of their money. This unanimous resolution must be made annually.

The Task Force recommends that the period of time used to determine soliciting status in section 1(1)(v) of Bill 54 be decreased from 3 preceding financial periods to 2 preceding financial periods. It was thought that 3 financial periods was too long, especially in those cases where the money solicited had been a small portion of a nonprofit corporation's annual budget.

RECOMMENDATION #16(v) That the time period used for establishing soliciting status in section 1(1)(v) of Bill 54 be decreased from 3 preceding financial periods to 2 preceding financial periods.

The Task Force recommends that sample forms for financial statements be provided. This would be useful for those nonprofit corporations which choose to utilize a Financial Committee for their financial reporting, as opposed to an independent auditor who has knowledge of the preparation of financial statements.

RECOMMENDATION #16(vi) That sample forms for annual financial statements be provided for the nonprofit corporations statute.

The Task Force also recommends that further consideration be given to the question of which standard of financial reporting should be included in the prescribed by-laws. The Task Force considered that the highest standard be included, i.e. the appointment of an independent auditor, but recognized that such a choice may not be appropriate for a small, non-soliciting nonprofit corporation. Similarly, the choice of a Financial Committee might not be appropriate for a soliciting nonprofit corporation with an annual budget of $1,000,000, although it is likely that in the latter case the nonprofit corporation would have sufficient resources to retain legal assistance in the preparation of its by-laws. The Task Force also discussed the possibility of resolving the matter by the provision of supplementary resource materials to assist nonprofit corporations in tailoring the prescribed by-laws to meet their individual needs, in which case the choice of the standard of financial reporting would not be a problem.

RECOMMENDATION #16(vii) That further consideration be given to the question of which standard of financial reporting should be included in the prescribed by-laws.

2. Directors

The Task Force recommends that nonprofit corporations be allowed to set the term for which their directors may serve, and that this term be provided for in the by-laws. Section 44(3) of Bill 54, which provides for a 3 year term for directors, should not be included in the new nonprofit corporations statute. It was apparent to the Task Force that nonprofit corporations have the knowledge and understanding of their own operations to enable them to determine the most appropriate term for their directors.

RECOMMENDATION #17(i) **That nonprofit corporations be allowed to establish in their by-laws the term for which their directors may serve, and that section 44(3) of Bill 54 therefore not be included in the new nonprofit corporations statute.**

The Task Force also recommends that the matter of directors' liability insurance coverage be investigated with a view to assessing the possibility of providing a surety fund, similar to the program provided for real estate agents in Alberta. The Task Force was made aware of a certain level of concern about the expense of the coverage for directors' liability.

RECOMMENDATION #17(ii) **That the matter of directors' liability insurance coverage be investigated with a view to assessing the possibility of providing a surety fund or a similar group insurance program.**

The Task Force also recommends that the wording in section 48(2)(a) not be mandatory, and that the subsection should commence "The by-laws may authorize the directors ...". The Task Force agreed that mandatory wording was not necessary under these circumstances.

RECOMMENDATION #17(iii) **That section 48(2)(a) of Bill 54, be revised by changing the mandatory wording to permissive wording such that the subsection will commence "The by-laws may authorize the directors ...".**

3. Members' Rights

The Task Force recommends that section 62(1) of Bill 54 be revised to provide that the number of members required to requisition a meeting should be established by a nonprofit corporation in its by-laws, but in no case shall the number be greater than 1/3 of the membership. The ability to determine this number was seen as necessary to accommodate the different sizes of membership and the varying levels of member participation.

RECOMMENDATION #18 That section 62(1) of Bill 54 be revised to provide that the number of members required to requisition a meeting be established by a nonprofit corporation in its by-laws, but in no case shall the number be greater than 1/3 of the membership.

4. Appeal Mechanism

The Task Force recommends that nonprofit corporations be permitted to provide for a process of mediation or arbitration in their by-laws. It is also recommended that both the statutory authority and the by-law provision be permissive, so that the resort to mediation or arbitration would simply be an option available if necessary, appropriate, and desired. The Task Force also felt it would be useful to include this option in the prescribed by-laws. Some representations to the Task Force indicated that nonprofit corporations wanted the option of considering a process for arbitration or mediation either before litigation or as an alternative to litigation.

RECOMMENDATION #19(i) That nonprofit corporations be permitted to provide for a process of mediation or arbitration in their by-laws.

RECOMMENDATION #19(ii) That both the statutory authority and the provision in the by-laws for mediation or arbitration be permissive.

RECOMMENDATION #19(iii) That the option of mediation or arbitration be included in the prescribed by-laws.

PART II: RECOMMENDATIONS REGARDING IMPLEMENTATION

RECOMMENDATIONS REGARDING IMPLEMENTATION

Through the process of reviewing Bill 54, the Task Force was continually impressed by the diversity, complexity, and dynamic nature of the nonprofit sector. The Task Force came to realize the importance of the nonprofit sector to Alberta. The sector is a significant economic force in the province in that it provides employment opportunities and millions of dollars in services that might not otherwise exist. It is also an effective vehicle for citizens to influence and participate in the development and operation of their communities. It was, therefore, of concern to the Task Force to learn of the apprehension of some members of the nonprofit sector about the proposed change in legislation.

Members of the nonprofit sector who provided input welcomed the opportunity to comment on the Bill before it became law and were eager to inform the Task Force about the provisions they felt would cause them difficulty. Some indicated that because their organizations and others lacked the resources to fully understand the impact of the proposed legislation, they were skeptical of its purpose and value. A few representatives suggested that, as their organization had not experienced difficulty with the existing statute, new legislation was unnecessary. Others feared that a change in legislation would complicate their activities, take time, attention, and scarce resources away from those activities, and render their operations as currently practised difficult, painful, or even impossible. Still others informed the Task Force that they expected the legislation to be clear and fair, and that they could accommodate the changes if practical explanatory materials were provided.

While the Task Force recognized that the nonprofit sector needs and deserves an incorporating statute that is modern and complete, it also recognizes that to effectively serve the needs and address the concerns of nonprofit corporations, the introduction and implementation of the new statute must be carefully designed and effectively delivered. An effective implementation strategy will ensure that nonprofit corporations will benefit from the new legislation without the perceived difficulties of change.

The Task Force identified the following elements as essential to an effective implementation strategy:

1. Comprehensive - an effective implementation strategy will address all aspects of the legislation and the needs of all those affected by the legislation.
2. Accessible - an effective implementation strategy will provide equal opportunity for service to all those affected by the legislation in a manner suitable to their needs regardless of their geographic location, sophistication, purpose, resources, or manner of operation.
3. Collaborative - an effective implementation strategy will work with the unique skills, structures, and expertise of the nonprofit sector.
4. Empowering - an effective implementation strategy will provide the tools that nonprofit corporations need to manage their corporate nature without need for government officials and expensive advisors.

The VIA Task Force mandate included recommending strategies for communicating and implementing new nonprofit legislation. The review process demonstrated that because of the nature of the nonprofit sector, change in legislation must be approached with patience and creativity. While the sector is not adverse to change, it does need sufficient information and time to accommodate the change. Many of those involved in the sector are involved on a part time, voluntary basis. The financial resources of the sector are much more limited than the resources of government or the business sector. The diversity of the sector in terms of influence, sophistication, and independence dictates that a variety of communication strategies be used.

RECOMMENDATION #20 That the new nonprofit legislation be implemented in stages and that a variety of techniques be used to allow sufficient time and opportunity for all affected by the legislation to become aware of it, to understand the impact of the legislation on their organization, and to manage the change with a minimum of difficulty and cost.

The Task Force determined that the implementation of new nonprofit legislation could be logically structured in three stages. For each stage of the implementation strategy, the Task Force defined goals and identified a variety of techniques that may be used to accomplish the goals. The techniques outlined evolved from the needs identified at public meetings and field tests, and in written submissions. As each implementation stage should build on the experience and momentum of the previous stage, additional techniques and methods will emerge as needs are identified. The following are the Task Force's suggestions for implementing the new legislation.

A. STAGE I - PRE-INTRODUCTION

The strategy employed in the period following the review of Bill 54 and prior to the introduction of the redrafted legislation is critical to the successful implementation of a new incorporating statute. It is at this stage that confidence in the proposed change can be established in the nonprofit community. The techniques suggested centre on providing adequate information to the nonprofit sector and encouraging the sector's involvement in the process to accomplish the following goals:

GOALS:
- a. to develop awareness of the proposed change in nonprofit legislation.
- b. to build understanding of the need for change in nonprofit legislation.
- c. to generate support for change in nonprofit legislation.

1. Developing Awareness

The review process revealed to the Task Force that many organizations and individuals in the sector were completely unaware of the introduction of Bill 54 and because of this treated the proposed legislation and the review process with caution and even suspicion. Consequently, the first task in an effective implementation strategy is to alert all societies and nonprofit companies, and all those professionals, consultants, government agencies and departments that advise, fund, and assist the sector of the proposed change. All those affected deserve notification that new legislation that will place Alberta on the leading edge of nonprofit legislation in Canada is being drafted to better serve this important sector.

The lack of awareness of the proposed change in legislation was further amplified by a lack of awareness of the common feature that links the many differing organizations in the nonprofit sector. Despite varying size and organizational complexity, societies and nonprofit companies are linked by their corporate status and nonprofit nature. Without an understanding of this "corporateness", the purpose of the incorporating statute is confusing and the impact of the proposed changes are worrisome. Awareness can be addressed in several ways. A clear, informative **handout or pamphlet** such as the one distributed by Alberta Solicitor General on The Motor Vehicle Administration Amendment Act would be a useful communication tool if widely distributed to the participants in the nonprofit sector. This would provide every nonprofit corporation with accurate, consistent information describing their corporate nature, their responsibilities in maintaining their corporate status, the role of Corporate Registry, the reasons for the proposed change in legislation, and the current status of the proposed legislation.

Awareness can be further heightened with an effective information campaign aimed at the nonprofit sector. Accurate clearly written **articles** on the proposed legislation disseminated through the network of nonprofit newsletters would ensure that members of nonprofit corporations are informed of the change. The **public service opportunities** that nonprofits use extensively to carry their message could be used in addition to the usual methods employed by the Public Affairs Bureau on introduction of new legislation.

2. Building Understanding

The Task Force field tests demonstrated that participants in the sector are eager to understand the legislation under which they are incorporated. It was clear, however, that materials are needed to assist understanding and these materials must be designed to meet the needs and style of the user. While a copy of the statute may be adequate for some users, others require materials that have been arranged in a more digestible form. A **simple interpretive kit** should be the first of a series of explanatory materials. The kit would interpret the key characteristics of the legislation and direct the user to other opportunities for information.

Public education in the form of presentations, consultations, and workshops will further raise the level of awareness and understanding. The profusion of conferences, seminars, and meetings that the nonprofit community sponsors and attends provides valuable opportunities for presentations and consultations on the proposed legislation. Workshops targetted to specific organizations, types of organizations, locations, or personnel, or based on issues or specific problem areas could serve to increase understanding in the nonprofit community and also provide an occasion for feedback on potential problems.

3. Generating Support

The key to gaining the support of the nonprofit community for the change in legislation was brought to the attention of the Task Force through its series of field tests. People support what they help create and many of the field test participants made it clear that they wish to be effectively involved in the development and implementation of legislation affecting them. The Corporate Registry data base is the logical beginning point in defining the nonprofit community and **establishing a resource base** of organizations and individuals who, because of their recognized leadership role or their unique programs and skills, could assist in the implementation process.

4. Other Activities

Finally, the pre-introduction stage is an appropriate time to review related legislation, to establish links with other government departments that work with nonprofit corporations, and to consider strategies for unique situations. For example, a review of the Public Contributions Act at this time would ensure that it is not in conflict with the new incorporating statute. Many nonprofit corporations expressed frustration with the proliferation of regulations and financial reporting requirements of the Gaming Commission, federal, provincial and municipal government departments, Revenue Canada, the Public Contributions Act, and public and private funders. This may be an appropriate time to demonstrate concern for this problem by initiating discussion with the various government departments with a view to clarifying and simplifying regulations and reporting requirements. During the pre-introduction stage a strategy should also be considered for special interest groups like the Hutterite colonies that are incorporated as nonprofit companies. While the Task Force received only limited input on concerns of this nature, it is aware that unique situations do exist and suggests that further study is warranted.

B. STAGE II - INTRODUCTION

On introduction of a new statute, the nonprofit community will want clear, practical information that interprets and explains the impact of the legislation. The techniques suggested for the period between introduction and proclamation of the new legislation focus on providing detailed information on the impact of the legislation and assistance to nonprofit corporations to accomplish the following goals:

a. to build understanding of the legislation
b. to provide tools for nonprofit corporations to accommodate the change to new legislation
c. to assist in problem areas
d. to solicit input into regulations
e. to prepare for administration of the new Act

This stage of implementation would build on the experience of the previous stage. The variety of techniques employed would be limited by the financial resources available and the desire of the nonprofit sector to take advantage of the opportunities offered. The following represents a variety of methods that may be utilized.

1. Explanatory Materials

The **interpretive kit** introduced in the preceding stage can be developed into a comprehensive tool providing detailed information on the new legislation. To facilitate its use by this very diverse sector, the kit should be adapted to specific users with interchangeable materials addressing the needs and style of the user. This widely available kit would interpret the provisions of the statute and also act as the practical guide to continuing to the new statute, incorporating an organization, and maintaining corporate status. **Interpretive articles** on specific provisions of the new legislation would also assist in explaining the new legislation. Organizations or individuals with specific problems could be assisted through a **"Help Line"** manned by staff thoroughly versed on the legislation and familiar with the operation of nonprofits. In a more innovative manner, **video tapes** could be used to explain incorporation, continuance, and maintenance of corporate status. Along this same line would be **computer assisted training** and a telephone based information system using **voice transmission** with a touch tone telephone.

2. Public Education

The series of field tests emphasized the desire of nonprofit corporations to understand the legislative machinery under which they are incorporated. A schedule of **public information sessions** delivered in various centres in the province would provide an opportunity for those wanting information about the new legislation to become more informed. Public education could also be offered in the form of **workshops** targetted to interested groups like funders or lawyers, and **presentations** on the impact of the new legislation at conferences, seminars, and annual meetings.

Public education initiatives provide an excellent opportunity to collaborate with the nonprofit sector in ensuring the effective implementation of the legislation. There exists in the sector training and educational programs that could effectively develop and deliver much of the information the nonprofit sector needs. The various public legal education centres, leadership and board development programs, and programs that provide organizational assistance and information already serve many of the training and information needs of nonprofit corporations.

During this stage, public input in regards to regulations, sample bylaws, and forms should be sought. The **field test** model used during the public review of Bill 54 was very successful and could be adapted to obtain this input.

Finally, preparation for the administration of the change in legislation requires training to sensitize staff to the nature of the nonprofit community as well as the procedures for continuance.

C. STAGE III - POST PROCLAMATION / ONGOING

It is on proclamation of the new legislation, that the nonprofit community will require a comprehensive support system to continue under the new statute. The goal of the final stage of the implementation strategy would be to provide support for nonprofit corporations to manage the change to the new statute.

In providing this support the strategies introduced in the previous stage may be augmented as needs are identified. The interpretive kit may need to be supplemented with additional explanatory materials. For example, a guide on bylaws would be useful for those nonprofit corporations considering a redefinition of membership, a change of their terminal distribution provision, or indemnification of directors. Information deficiencies can be addressed as they emerge through information circulars, tipsheets, and guides.

In the same way, the public education campaign may be adapted as need develops. This is an excellent opportunity to alert the public to the legal context within which nonprofit corporations operate. Awareness of matters such as the implication of a nonprofit organization's provision for distribution on dissolution is essential to potential donors, supporters, and funders.

If provided with clear, simple forms, comprehensive explanatory materials that are tailored to the needs of the user, adequate opportunity for information and education, and departmental help as problems are encountered, nonprofit corporations will be able to manage their corporate matters on their own. This initial effort should ultimately result in greater administrative efficiency. With a complete incorporating statute and the tools necessary to manage their corporate nature, nonprofit corporations will have less need of government resources.

PART III: OTHER ISSUES FOR CONSIDERATION

OTHER ISSUES FOR CONSIDERATION

The VIA Task Force, through its public meetings, field tests, and the submissions it received, was able to address the issues that appeared to be of major concern. In the process, the Task Force was also made aware of issues which, although not of widespread concern to the nonprofit community, were of concern to a number of lawyers whose practices included nonprofit organizations and their problems. The Task Force was of the view that many of these issues merited closer consideration and referred them to the Alberta Law Reform Institute for research or comment. The submissions which raised these issues and the comments and opinions of the Institute are appended to the Report. (Appendix 2). Following is a summary of those issues. The summary is divided into two categories - those issues which it is recommended be dealt with in a redraft of Bill 54, and those issues which it is suggested be given further consideration.

A. RECOMMENDATIONS FOR CHANGE TO BILL 54

1. Sections 34 and 79 of Bill 54 incorporate a number of Business Corporations Act (B.C.A.) provisions by reference. Certain of these B.C.A. provisions are inconsistent with Bill 54. This is essentially a drafting issue which should be rectified in a redraft of Bill 54.
   (See the letter from Frans Slatter, McCuaig Desrochers, December 28, 1988 at pages 5 and 6; and the reply of William Hurlburt, Institute of Law Research and Reform, March 6, 1989, at pages 10 and 11).

   Similarly, there are some drafting problems which arise with the application of section 184 of the B.C.A. to nonprofit corporations. These should be addressed in a redraft of Bill 54.
   (See Frans Slatter's letter at page 6, and William Hurlburt's response at page 11).

2. Section 114 of Bill 54 should be revised to include a reference to the court's power to order distribution of property.
   (See Frans Slatter's letter at page 11, and William Hurlburt's response at page 17).

B. ISSUES FOR FURTHER CONSIDERATION

1. Directors, Officers and Agents

a) Should the following wording be removed from Section 25 of Bill 54, thereby removing the qualification of the authority of directors, officers and agents?

> ... unless the person has or by virtue of his position with or relationship to the incorporated association ought to have, knowledge of those facts at the relevant time?

(See the letter from H.I. Shandling, Duncan & Craig, September 30, 1988 at pages 1 and 2; and the reply of William Hurlburt, Institute of Law Research and Reform, March 1, 1989, at pages 1 and 2).

b) Should a provision be included whereby the members could over-rule a decision of the directors?

(See Shandling at pages 2 and 3; see Hurlburt's reply at pages 3 and 4).

c) Should Bill 54 be revised to limit or minimize the potential for liability of mentally handcapped directors?

(See letter from Gwen Harris, February 19, 1989; and the reply of William Hurlburt, Institute of Law Research and Reform, March 6, 1989).

d) Should section 113, 114 and 118 of the Business Corporations Act be included in Bill 54? Specifically:

i) Section 113 provides for the liability of directors and officers who authorize certain transactions relating to shares contrary to the statute;

ii) Section 114 provides for the liability of directors for the wages of the employees of a corporation; and

iii) Section 118(1) places an onus on a director to show that he did not consent to a resolution adopted at a meeting at which he was present, and section 118(3) excuses a director who has relied in good faith on a corporation's financial statements or on expert opinions.

(See the letter from Richard Cotter, Milner & Steer, December 30, 1988 at page 7; and the reply of William Hurlburt, Institute of Law Research and Reform, March 6, 1989 at page 8).

e) Is it necessary to revise Bill 54 to provide for different classes of directors, or can that be accomplished under the existing provisions? (See Frans Slatter's letter at page 7; see William Hurlburt's reply at page 12).

f) Should nonprofit corporations be permitted to override their by-laws and articles by contract? (See Frans Slatter's letter at page 8; see William Hurlburt's reply at page 12).

g) Should section 50 of Bill 54 be made more flexible so as to allow the by-laws to provide more restrictions on conflicts of interest?

Or should it be drafted to provide guidance regarding what constitutes a material contract?

(See Frans Slatter's letter at page 9; see William Hurlburt's reply at page 13).

2. Incorporation by Reference

Should the portions of the Business Corporations Act which are incorporated by reference in Bill 54, instead be reproduced in their entirety in a new nonprofit corporations statute?

(See Frans Slatter's letter at pages 5 and 6; see William Hurlburt's reply at page 9, 10 and 11; see Richard Cotter's letter at pages 4 and 5; see William Hurlburt's reply at pages 6 and 7).

3. Disclosure of Beneficial Interest

Should the statute require that trust relationships, beneficial interests and the identitites of beneficiaries be disclosed?

(See Richard Cotter's letter at page 4; see William Hurlburt's letter at page 6).

4. Financial Assistance

a) Should section 78(1) of Bill 54 be revised by deleting the last part of that section beginning at "... if there are reasonable grounds for believing that ..."? The result would be that the application of the prohibition against financial assistance would not be restricted to a situation where it would impair the financial liquidity of the nonprofit corporation.

(See Richard Cotter's letter at pages 6 and 7; see William Hurlburt's reply at page 8).

b) Should section 78(4) of Bill 54 be deleted?

(See Frans Slatter's letter at pages 9 and 10; see William Hurlburt's reply at page 14).

5. Effects of Incorporation

a) Should section 20(a) of Bill 54 be revised to read "...in accordance with its articles or by-laws..." as a means of ensuring that upon dissolution a nonprofit corporation's assets will go for the designated purposes?

(See Frans Slatter's letter at pages 2 and 3; see William Hurlburt's letter at pages 3 and 4).

b) Should section 6(2)(b) of Bill 54 be made applicable to section 5(a)?

(See Frans Slatter's letter at page 3; see William Hurlburt's reply at pages 4 and 5).

c) Should section 31(2) of Bill 54 be revised so as to ensure that there will be no imposition of personal liability on a shareholder or member of a nonprofit corporation, and no confiscation of the interest of a member or shareholder of a single constraint nonprofit corporation?

(See Frans Slatter's letter at pages 4 and 5; see William Hurlburt's reply at pages 6 to 9).

6. Definition of "Soliciting Corporation"

Should the definition of "soliciting" be extended to include the receipt of funds from another nonprofit corporation?

(See Frans Slatter's letter at page 1; see William Hurlburt's reply at page 1).

7. Name

Should section 12(6) of Bill 54 be broadened to allow for the use of a name in any language?

(See Frans Slatter's letter at page 3; see William Hurlburt's letter at page 5).

8. Membership

a) Should the application of the rules of natural justice in section 31(3) of Bill 54 be extended to disciplinary actions other than termination?

   (See Frans Slatter's letter at page 5; see William Hurlburt's reply at page 9).

b) Will section 25(2) of the Business Corporations Act which provides that shares are nonassessable, pose a problem for nonprofit corporations incorporated under Bill 54 with share capital? (NOTE: Section 25(2) of the B.C.A. has been incorporated by reference into Bill 54 in section 34 of the Bill).

   (See Frans Slatter's letter at page 5; see William Hurlburt's reply at page 10).

c) Should the option of having par value shares be retained for nonprofit corporations?

(See Frans Slatter's letter at page 5; see William Hurlburt's reply at page 10).

d) Does section 26 of the Business Corporations Act regarding stated capital accounts, have any applicability to nonprofit corporations?

(See Frans Slatter's letter at page 5; see William Hurlburt's reply at page 10).

e) Will the applicability of section 30 to 33 of the Business Corporations Act regarding prohibited shareholdings and the acquisition by a corporation of its own shares, present any problems for nonprofit corporations?

(See Frans Slatter's letter at pages 5 and 6; see William Hurlburt's letter at page 10).

f) Should legislative guidelines be provided to deal with internal factional problems within a nonprofit corporation?

(See Frans Slatter's letter at pages 6 and 7; see William Hurlburt's reply at page 11).

g) Should a ceiling be imposed on the value at which a share in a nonprofit corporation can be transferred?

(See Frans Slatter's letter at page 3; see William Hurlburt's letter at page 4).

h) Does section 6(1)(b) of Bill 54 regarding the payment of fair value for surrendered shares, fall within section 36(a) of Bill 54 regarding transfer of membership? If it does, should it?
(See Frans Slatter's letter at page 7).

9. Remedies

a) Should the remedies presently available in Bill 54 be strengthened and broadened? Specifically:

   i) Should the investigation remedy be made available to individuals or organizations who are not members of the nonprofit corporation they wish to have investigated?
   (See Richard Cotter's letter at pages 2 and 3; see William Hurlburt's reply at pages 2 and 3).

   ii) Should the investigation remedy be made availbable to donors, creditors, and the Attorney General?
   (See Frans Slatter's letter at pages 10 and 11; see William Hurlburt's reply at page 16).

   iii) Should the oppression remedy, which was not included in Bill 54, be included in a revised nonprofit corporation statute?
   (See Richard Cotter's letter at pages 3 and 4; see William Hurlburt's reply at pages 4 and 5).

b) Should reference also be made to sections 5, 6, 18 and 19 in section 110(1)(b) of Bill 54?

(See Frans Slatter's letter at page 11; see William Hurlburt's reply at page 17).

c) Should section 111(1)(a) of Bill 54 be expanded to allow a person who has made a donation to apply for dissolution on the grounds of oppression, unfair prejudice, or unfair disregard of interests?

(See Frans Slatter's letter at page 11; see William Hurlburt's reply at page 17).

d) Should donors be given notice under section 117 of Bill 54?

(See Frans Slatter's letter at page 11; see William Hurlburt's reply at page 17).

PART IV: APPENDICES

APPENDIX 1

LIST OF RECOMMENDATIONS

RECOMMENDATION #1(i) That the Societies Act and the Companies Act be replaced with new legislation to govern nonprofit corporations in Alberta.

RECOMMENDATION #1(ii) That the new legislation take the form of the proposed Bill 54, the Volunteer Incorporations Act, with the revisions recommended in this Report.

RECOMMENDATION #2(i) That the new legislation be an enabling corporate statute with a limited regulatory function with respect to nonprofit corporations which use public money; and

RECOMMENDATION #2(ii) That the regulatory control be by way of a requirement for public disclosure of a nonprofit corporation's incorporating documents and annual financial statements.

RECOMMENDATION #3 That the new legislation follow Bill 54 and draw no distinction between the existing corporate structures of societies and nonprofit companies.

RECOMMENDATION #4 That the language of the new legislation be clear, precise, and complete, as it is in Bill 54.

RECOMMENDATION #5 That the new legislation follow the model of the Business Corporations Act in so far as it is appropriate and practical to do so.

RECOMMENDATION #6(i) That the principle of incorporation as of right provided for in Bill 54 be followed in the new legislation.

RECOMMENDATION #6(ii) That Bill 54 be followed such that restrictions or limits NOT be placed upon the purposes for which nonprofit corporations can be incorporated, and that nonprofit corporations be permitted to incorporate for any lawful purpose, including the carrying on of a trade or business.

RECOMMENDATION #6(iii) That nonprofit corporations be required to state the purposes for which they are being incorporated, as is currently required in Bill 54.

RECOMMENDATION #6(iv) That the one person incorporations provided for in Bill 54, be provided for in the new legislation.

RECOMMENDATION #7 That the balance achieved in Bill 54 between the rights of members and the authority of directors be maintained in the new legislation.

RECOMMENDATION #8 That the duty and standard of care of directors provided for in Bill 54 be maintained in the new legislation.

RECOMMENDATION #9(i) That the name of the new legislation to govern Alberta's nonprofit corporations be the Nonprofit Corporations Act.

RECOMMENDATION #9(ii) That nonprofit corporations use the acronym "N.P.C." after their corporate names, in the same way that business corporations use the abbreviation "Inc.".

RECOMMENDATION #9(iii) That all of Alberta's nonprofit corporations use the acronym "N.P.C.", including the existing nonprofit corporations which will continue under the new legislation from the Societies Act and the Companies Act, as well as all new incorporations under the new statute.

RECOMMENDATION #10(i) That the classification scheme for nonprofit corporations proposed in Bill 54 be retained, such that nonprofit corporations will be classified on the basis of their source of funding i.e. soliciting or non-soliciting.

RECOMMENDATION #10(ii) That the proposed category of "prescribed soliciting associations" not be used in the new Nonprofit Corporations Act.

RECOMMENDATION #10(iii) That the definition of soliciting be clarified to indicate that "money" and "similar financial assistance" do not include gifts in kind, annual membership fees or dues, or fees for service, and further, that the term "solicited money" means money actually received.

RECOMMENDATION #11(i) That nonprofit corporations be required to file their by-laws with Corporate Registry, whether the by-laws are those prescribed in the Regulations, or those drafted specifically for the nonprofit corporation.

RECOMMENDATION #11(ii) That the time period for filing notice for changes of directors, and of registered offices, etc., be changed from 15 days to 30 days.

RECOMMENDATION #11(iii) That there be a more convenient coordination between the filing dates for annual returns and the annual financial statements and the anniversary dates, fiscal year ends, and annual general meetings of nonprofit corporations.

RECOMMENDATION #12(i) That the phrase "rules of natural justice" in section 31(3) of Bill 54 be replaced with or followed by a list of the actual rules of natural justice.

RECOMMENDATION #12(ii) That the unanimous shareholders' agreement be made available to nonprofit corporations incorporated with share capital.

RECOMMENDATION #13(i) That there be a provision for the appointment of directors by an outside appointing authority if the by-laws so provide.

RECOMMENDATION #13(ii) That a provision similar to section 117(4) of the Business Corporations Act be included in the new nonprofit corporations statute in order to alleviate potential conflict of interest problems for the directors of nonprofit corporations.

RECOMMENDATION #14(i) That only those existing societies and nonprofit companies which are in default of the incorporation requirements of the new nonprofit corporations statute be required to file formal continuance documents with Corporate Registry.

RECOMMENDATION #14(ii) That the new nonprofit corporations statute be implemented over a 3 year period.

RECOMMENDATION #14(iii) That the cost of continuance escalate annually from a starting point of $0 for the first year.

RECOMMENDATION #14(iv) That a comprehensive support system be provided to assist nonprofit corporations in continuing under the nonprofit corporations statute.

RECOMMENDATION #14(v) That nonprofit corporations presently incorporated under the Business Corporations Act be permitted to continue under the nonprofit corporations statute, provided they meet its requirements.

RECOMMENDATION #15 That section 78(2) of Bill 54 be revised to specifically authorize, where the articles so provide, the payment of benefits, pensions, annuities, or the rendering of services to its members in the event of death, accident, illness, or other misfortune.

RECOMMENDATION #16(i) That the new nonprofit corporations statute require nonprofit corporations to choose their own standard of financial reporting and include that standard in their by-laws.

RECOMMENDATION #16(ii) That the choice of standards of financial reporting take the following form:

- a) appoint an independent auditor to perform an audit,
- b) appoint an independent accountant to conduct a review engagement, or
- c) appoint a Financial Committee consisting of one or more independent persons or members to:
  - i) scrutinize the financial information, and supporting records, documents, books, accounts, and vouchers of the corporation,
  - ii) obtain information and explanations from directors, officers, employees, agents, or former members of the Financial Committee, and
  - iii) communicate findings or conclusions to the members.

RECOMMENDATION #16(iii) That only nonprofit corporations which solicit money from the public be required to publicly account for that money by filing their annual financial statements with Corporate Registry. Administratively this would be determined by requiring nonprofit corporations to indicate their status as soliciting or non-soliciting on their annual return.

RECOMMENDATION #16(iv) That nonprofit corporations which do not use public money be permitted to resolve unanimously not to account for the use of their money. This unanimous resolution must be made annually.

RECOMMENDATION #16(v) That the time period used for establishing soliciting status in section 1(1)(v) of Bill 54 be decreased from 3 preceding financial periods to 2 preceding financial periods.

RECOMMENDATION #16(vi) That sample forms for annual financial statements be provided for the nonprofit corporations statute.

RECOMMENDATION #16(vii) That further consideration be given to the question of which standard of financial reporting should be included in the prescribed by-laws.

RECOMMENDATION #17(i) That nonprofit corporations be allowed to establish in their by-laws the term for which their directors may serve, and that section 44(3) of Bill 54 therefore not be included in the new nonprofit corporations statute.

RECOMMENDATION #17(ii) That the matter of directors' liability insurance coverage be investigated with a view to assessing the possibility of providing a surety fund or a similar group insurance program.

RECOMMENDATION #17(iii) That section 48(2)(a) of Bill 54, be revised by changing the mandatory wording to permissive wording such that the subsection will commence "The by-laws may authorize the directors ...".

RECOMMENDATION #18 That section 62(1) of Bill 54 be revised to provide that the number of members required to requisition a meeting be established by a nonprofit corporation in its by-laws, but in no case shall the number be greater than 1/3 of the membership.

RECOMMENDATION #19(i) That nonprofit corporations be permitted to provide for a process of mediation or arbitration in their by-laws.

RECOMMENDATION #19(ii) That both the statutory authority and the provision in the by-laws for mediation or arbitration be permissive.

RECOMMENDATION #19(iii) That the option of mediation or arbitration be included in the prescribed by-laws.

RECOMMENDATION #20 That the new nonprofit legislation be implemented in stages and that a variety of techniques be used to allow sufficient time and opportunity for all affected by the legislation to become aware of it, to understand the impact of the legislation on their organization, and to manage the change with a minimum of difficulty and cost.

APPENDIX 2

LETTERS RELATING TO PART III

Institute of Law Research and Reform

Established by:
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University of Alberta
The Law Society of Alberta

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Office Hours 8 am - 12 noon, 1 pm - 4 pm

March 6, 1989

Gwen Harris
Chairman, VIA Task Force
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8th Floor, 10365 - 97 Street
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CW Dalton
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HJ Irwin
Prof DP Jones, QC
Prof PJM Lown
Mr Justice DB Mason
Dr JP Meekison
BL Rawlins
ACL Sims
CG Watkins

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BR Burrows
C Gauk
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Directors Emeriti
WF Bowker, QC
WH Hurlburt, QC

Dear Mrs. Harris:

I enclose a letter to you dealing with the question raised in your letter of February 19th about mentally handicapped directors. I also enclose letters which, respectively, comment on the letters from Mr. Cotter, Mr. Shandling and Mr. Slatter.

I think that the points which have been raised are all either questions of policy or questions as to how Bill 54 should be drafted. I do not think that there is any research to be done with respect to any of them which would help the decision making process.

I think that the great bulk of the points raised are the sort of things that lawyers get excited about. That is not to discount their importance, because lawyers do tend to think about things that might happen and how legislation will cope with them.

This makes it difficult for the Task Force, which probably would prefer not to spend its time arbitrating between conflicting lawyers' statements. I regret to say, however, that it seems to me that it is necessary that someone for the Task Force plod through the points, point by point. In some cases, the point will be so clearly a drafting point that the Task Force could simply recommend that legislative counsel deal with it. Where there is any policy element, it seems to me that the Task Force should give a view. The dichotomy between the policy and drafting is rarely neat and tidy. For example, the suggestion that the parts of the BCA which Bill 54 incorporates by reference should be set out in Bill 54 is, in one sense, a drafting point, but, on the other, it goes to the useability of Bill 54 for the consumer (or, so I think).

I would have no objection to my letters going to Messrs. Cotter, Shandling and Slatter for further comment. If the Task Force wishes to meet them, I would be happy to be present at the meetings if that is what the Task Force wants.

Dealing with all this detail in a report and recommendations would add a good deal of clutter. I have no idea what form the Task Force's output is likely to take, but there may be a good many points which the Task Force may merely want to deal with by a schedule without reasons, as giving reasons for every one of these points would lead to a very long and rather tiresome report. Alternatively, the Task Force might put out a report dealing with the matters of policy which it thinks important, and consign other points either to later chapters or to appendices.

I will be at the Corporate Registry at 2:00 p.m. on March 10th.

Yours sincerely,

W.H. Hurlburt

WHH/cr
Attachments

Gwen Harris
10311 -134 Street, Edmonton, Alberta T5N 2A9

February 19, 1989

Mr. William Hurlburt
402 Law Centre
University of Alberta
Edmonton, Alberta
T6G 2H5

Dear Mr. Hurlburt,

I enclose copies of the submissions from Mr. Shandling, Mr. Cotter, and Mr. Slatter which we talked about last week. You have possibly already considered many if not all of the issues raised in these submissions and I appreciate your agreeing to comment on them.

Also, I have a concern as a result of work I have done recently with the Alberta Association for Community Living. This association is an umbrella group for organizations that provide services for the mentally handicapped. It is the practice of many of these organizations to include mentally handicapped individuals on their Board as voting directors. My concern is how 51 (1) (b) would be applied to such a director in that some of these individuals have been determined by the Court to be incapable of looking after their own affairs and have had a guardian appointed for them. There seems to be no end to the unique variations organizations want to employ in managing their affairs.

We appreciate your continuing assistance and patience as we work our way through this review process. It would be very helpful if you could meet with me and Joan Riddle and Bert Proskiw to discuss the enclosed submissions. I will call your office this week to find out if we may arrange a meeting.

Thank you again Mr. Hurlburt, we appreciate your help.

Yours truly,

Gwen Harris
Chairman, VIA Task Force

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C Bowers

Directors Emeriti
WF Bowker QC
WH Hurlburt QC

Dear Mrs. Harris:

RE: MENTALLY HANDICAPPED DIRECTORS

The question raised in your letter of February 19th is how section 51(1)(b) would apply to a mentally handicapped director of an incorporated association. I can give an answer of sorts. It is not a conclusive legal answer.

Section 51(1)(b) is intended to impose an objective test for care, skill and diligence, that is to say, one that will apply to everyone, whatever his or her abilities and qualifications. I expect that this is what is troubling you.

It can be argued that section 51(1)(b) does not entirely succeed in making the test objective. The argument is that the "comparable circumstances" which determine how high the standard is include a lack of qualification or ability in the particular person involved. That is to say, that what is reasonable to require of a person in circumstances which include the circumstances that the person is mentally handicapped, is different from the standard which would be required of a person in other "circumstances".

I do not think that this is a good enough answer. In fact, it is dubious. It would probably require a case in which the sympathies of the court were heavily on the side of the director who is sued for breach of duty.

There is a further answer. It is in section 51(4). This provision is specifically intended to allow a court to exonerate a director who ought to be exonerated.

The precise wording of the provision has one drawback. It is that the director "has acted honestly *and reasonably*". Presumably the hypothetical case we are dealing with is one in which the mentally handicapped director did not act "reasonably" as that word would usually be understood.

There is a further drawback. The exoneration is discretionary: "The court may ... relieve" the director wholly or partly from liability.

My own view is that, practically speaking, a mentally handicapped director will not run any real risk of liability. It being quite clear that the director has been chosen specifically because he or she is one of a group of mentally handicapped people, a court would have no hesitation in exonerating the director for not exercising the care, diligence and skill of a person who is not mentally handicapped. This is not, as you will notice, a statement of black letter law, and you may remain uneasy on the grounds that, if the court has a discretion, it may exercise the discretion the wrong way.

There is one thing that I think should be considered. It is dropping the words "and reasonably" from section 51(4). This thought has crossed my mind before. The reason that "reasonably" is there is that the provision is taken from a section in the Trustee Act which allows a court to exonerate a trustee from liability. On thinking about it, particularly in the light of your concern, I would not be at all unhappy if the section allowed for exoneration "if it appears that the director or officer has acted honestly and ought fairly to be excused". Bearing in mind that the section 51(1)(b) duty itself may be said to be a duty to act reasonably, it is probably not right to say that the exoneration can take place only if he did act reasonably. There is therefore a reason of general application, and not merely a reason in connection with a mentally handicapped director, why the words might be deleted. I should perhaps say that we had specifically contemplated the case of the mentally handicapped director. That is one reason why the BCA disqualification for mental incompetence does not appear in the Institute's recommendations or in Bill 54. We did not however specifically consider the question which you have asked, which is perceptive.

The upshot is:

(a) that I cannot give you an absolute legal guarantee that a mentally handicapped director cannot be held liable for failure to exercise care, diligence and skill which, by definition, he or she does not have;

(b) that even on the existing wording of section 51(4), I believe that the chance that a mentally incompetent director would be held liable for breach of the duty of care, diligence and skill is minimal;

(c) that removing the words "and reasonably" would make the danger negligible.

It would be difficult to achieve greater certainty without affecting other cases. It might be possible to provide that the duty does not apply if a director is chosen with knowledge that he or she is mentally incompetent. This would probably be narrow enough to avoid prejudice in other cases. I would not particularly like it, but that may merely be based on a feeling that it would be inelegant, which is not really a good enough reason for rejecting it. If you wish to go further, we could look at different ways of doing it and see whether a better one could be found.

Yours sincerely,

W.H. Hurlburt

WHH/cr

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FILE
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DELIVERED

December 30, 1988

Ms Carrie Waldbillig
10365 - 97th Street
8th Floor
Edmonton, Alberta
T5J 3W7

Dear Ms Waldbillig:

Re: Volunteer Incorporations Act, Bill 54

We have been instructed by Canada Mortgage and Housing Corporation ("CMHC") to convey some concerns it has about Bill 54. CMHC appreciates how difficult it is to have major changes introduced at this stage and has, therefore, reduced to a minimum the concerns which could be voiced.

CMHC's Concerns Generally

Non-profit corporations receive funds from CMHC by way of grants made under Part V in the National Housing Act ("NHA"), of direct loans made under section 15.1 in the NHA and of insured loans made under section 6, coupled with assistance given under section 56.1, in the NHA. The grants etc give CMHC real economic interests in those non-profit corporations which receive financial assistance, but it does not follow that CMHC will always become a creditor in the sense of being the holder of a debt obligation. Thus CMHC has a real economic interest in a non-profit corporation funded by way of a grant made under Part V in the NHA but would not be the holder of a debt obligation if, by the terms of the grant, there is no debt which has to be repaid.

One of the most important assurances sought by CMHC, when it provides financial aid, is being satisfied that the funds advanced will be used for their approved purpose and are therefore properly managed and spent so as to benefit the ultimate beneficiaries of the government program in question (e.g., benefitting low income tenants who lease accommodation from a funded non-profit low income housing corporation). CMHC attempts to secure the assurances it seeks by restricting the purposes and powers of funded corporations through required alterations to their articles and bylaws and through contractual arrangements concluded with the corporations. You nevertheless know that restraints imposed in the ways described do not foreclose a corporation (or its directors, officers or majority members) from engaging in conduct which is oppressive or unfairly prejudicial to, or which unfairly disregards the interests of, persons like CMHC or persons who are the true beneficiaries of outside funding but have no direct voice in the corporation because they are not on its register of members or part of its management.

CMHC would have persons like it and the voiceless beneficiaries described in the preceding paragraph protected by including in Bill 54 provisions which expressly recognize the interests they have, be those interests economic or measured by some other yardstick. Most suggestions hereafter made are therefore directed toward strengthening remedies, broadening the categories of persons entitled to exercise remedies, compelling disclosure of beneficial interests and preventing assets being dissipated through acts which do not advance corporate purposes.

Strengthening Remedies

1. An ability to seek investigation orders is important to persons like CMHC and to those for whose benefit a non-profit corporation had been created but who might not be registered as members thereof. The prospect of investigation usually has a sobering effect on management if the investigation can be instigated by persons who usually do not have access to

all corporate information and yet have interests that might be disregarded if they are without remedy.

It is suggested, so far as it concerns persons like CMHC, that the holder of a debt obligation be permitted to apply for an investigation order (see section 223(1) in the ABCA read in light of section 1(u) therein) and that those who fund a non-profit corporation by way of grants, to enable it to fulfil the purposes for which it had been created, also be permitted to apply for such an order. This might be accomplished by adding a new clause (d) to section 94(1) in Bill 54 which, rather than follow the solution offered by section 231(b)(iii) in the ABCA, would specifically refer to holders of debt obligations and to the grantors described.

It is suggested, so far as it concerns those for whose benefit a non-profit corporation had been created, that beneficiaries also be permitted to apply for an investigation order. A distinction might have to be drawn between groups of persons whom the purposes set forth in the corporation's articles would expressly or impliedly benefit (e.g., when the corporation's articles include among the purposes therein stated providing financial assistance to refugees) and persons declared the beneficial owners of memberships or shares registered in the names of others (e.g., a trust declaration by a registered member or shareholder that the membership or share he holds is held for the benefit of a named person or an identified group of persons). The circumstance first mentioned could be resolved by having section 94(1) in Bill 54 give a beneficiary contemplated by the corporation's articles the right to apply for an investigation order. The circumstance last mentioned could be resolved by having a provision similar to the one found in section 231(b)(i) of the ABCA, which refers to "a registered holder or beneficial owner, or a former registered holder or beneficial owner...", included in section 94(1) of Bill 54.

2. CMHC believes strongly that Bill 54 should contain a provision equivalent to section 234 in the ABCA. The so-called oppression remedy was omitted from Bill 54 because it was thought that members in a non-profit corporation have no economic interest which requires protection (Proposals for a New Alberta Incorporated Associations Act, pp 62-64). That philosophy, if it be sound, overlooks the economic interests which creditors and grantors of funds have: indeed, those

interests are partly recognized by section 135 in Bill 54 which refers to a "complainant or a creditor".

Creditors (the holders of debt obligations), grantors of funds and the beneficiaries described in paragraph 1 above should have the protection afforded by section 234 in the ABCA. Section 126(b) in Bill 54 would have to be altered so as to broaden the categories of persons considered "complainants" for the purposes of Part 20 amended to include the so-called oppression remedy. Thus, section 126(b)(i) might be expanded to protect the beneficial and former beneficial owners of memberships or shares (see section 231(b)(i) in the ABCA) and section 126(b)(iii) might be renumbered 126(b)(iv) to include a new 126(b)(iii) that would refer to the holder of a debt obligation and a grantor of funds (see para 1 above in relation to investigation orders).

Disclosure of Beneficial Interests

3. Bill 54 should require that trust relationships, beneficial interests and the identities of beneficiaries be disclosed. The requirement would be consistent with alterations which strengthen remedies (see paras 1-2 above).

Disclosure would identify persons who have interests entitled to be protected and should, perhaps, be made in the Annual Return (section 29 in Bill 54) as well as in the register of members a non-profit corporation is required to maintain (section 37 in Bill 54). References to unregistered beneficial owners of memberships or shares will not impact on provisions like section 47 in the ABCA which is incorporated, by reference, into Bill 54 (section 34(b) in the Bill).

Incorporation by Reference

4. Sections 34 and 79 in Bill 54 incorporate into the Bill certain provisions in the ABCA. The provisions in question are so important that they should, in CMHC's view, be restated in the Bill.

Incorporation by reference can create confusion or uncertainty and hampers efficient research (e.g., deciding which of the provisions in Part 6 of the ABCA relate to "shares" and which to "debt securities" for the purposes of sections 34(b) and 79(a) in Bill 54 or noting that section 135 in Bill 54 refers to a "receiver-manager" but finding it necessary to refer to Part 8 in the ABCA, incorporated into Bill 54 by section 79(c) therein, in order to find provisions which deal with receivers and receiver-managers). The technique also obscures important remedies (e.g., the remedy "any interested person" has to apply to court for the appointment of a receiver or receiver-manager under section 95 in the ABCA which is incorporated into Bill 54 by section 79(c) therein).

Thought should be given, after Part 7 in the ABCA is set forth in Bill 54, to expanding sections 77(1)(b)-(c) and 77(2) by referring to trust deeds and declarations which create trust relationships between registered members or shareholders and the unregistered beneficial owners of memberships or shares. This might, for example, ensure that a trustee could not at the same time be a director, officer and registered member of the non-profit corporation (section 78(1) in the ABCA and, thereby, provide better protection to beneficiaries. The suggestion advanced is consistent with CMHC's desire to have trust relationships disclosed (see para 3 above).

"Shares" and "Memberships"

5. "Shares" and "memberships" should be treated consistently in Bill 54 so far as it is possible so to do. The Bill, read in light of the provisions in the ABCA incorporated by reference, has not been studied closely to comment to the degree of consistency or inconsistency and CMHC would like an opportunity to address you further on this issue in the next short while.

Distribution of Property and Income

6. CMHC has voiced concerns on section 5 in Bill 54. The comments it has made read:

> Section 5 should be amended to delete subsection (a) entirely, such that the only provision allowed is subsection (b) to the effect that no income or property shall be distributed during the existence of the incorporated association on or after its liquidation, to

> a member, director or officer. If subsection (a) is allowed (which currently permits distribution to a member, director or officer on or after liquidation), protections are needed. For example, inserting of wording such as: "Where the Registrar of Corporations is satisfied with the equity and intent of any such proposed distribution".

CMHC knows section 5 is the result of a major policy decision and realizes you probably will not give effect to the requests it makes. You are nevertheless asked to consider CMHC's concerns and requests.

7. CMHC has also voiced concerns on section 6 in Bill 54. The comments it has made read:

> Section 6(a) currently allows a member of an incorporated association to provide goods, services or other valuable benefits to the association at a reasonable price or remuneration. It is recommended that the words "on an occasional basis" be inserted in that subsection.

CMHC knows you may not be sympathetic to the proposal made. You are nevertheless asked to consider the proposal having regard to the circumstance that abuses can arise with respect to determining the meanings and value of "services" and "other valuable benefits" as well as with respect to the word "reasonable" in the context of the phrase "reasonable price or remuneration". Might we, for example, draw your attention to section 25(3)-(5) in the ABCA, read in light of section 113(1) in that Act, and ask that you consider adapting those provisions to section 6(a) in Bill 54 should it be decided that the latter provision is to be retained.

Financial Assistance

8. CMHC has also commented on section 78 in Bill 54. The comments it has made read:

> Section 78 of the Bill should prohibit financial assistance (donations, loans, guarantees and the like) to any member. Currently, the section states that such prohibition only applies if it would impair the financial liquidity of the Corporation. Alternatively,

> if any such donations, loans, guarantees and the like is to be permitted, it should require the sanction of the Court or the consent of the Registrar of Companies.

CMHC knows the request it makes is unlikely to be granted. You are nevertheless asked to consider the request made having regard to the circumstance that outside funding could be dissipated through provisions like section 78. It might, for example, be thought prudent to retain section 78(2), because it is associated with the purposes of a non-profit corporation, but to delete section 78(1).

Directors' Liabilities

9. You are urged to include in Bill 54 provisions like sections 113, 114 and 118 in the ABCA. Section 113, suitably adapted to the context of Bill 54, is particularly important as it would be pertinent to provisions like sections 6(1)(a) and 78 in Bill 54.

Unanimous Shareholder Agreement

10. It would seem appropriate to permit unanimous shareholder agreements when feasible. A creditor or grantor of funds can, as you know, be a party to a unanimous shareholder agreement concluded under the ABCA and section 240 in the ABCA permits "a complainant or a creditor" of a corporation to seek a compliance or a restraining order in relation to the agreement.

CMHC thinks that unanimous shareholder agreements are valuable devices for imposing controls on a corporation, its directors, officers and members or shareholders. You are therefore requested to consider providing for such agreements in Bill 54.

Concluding Remarks

We shall be pleased to address you, in a meeting arranged at your convenience, on any issues set forth in this letter. You are, in the meantime, thanked for giving CMHC the opportunity to advance the suggestions and recommendations made.

Yours sincerely,

MILNER & STEER

Per: Richard J. Cotter

CEM/kjf/104997

Institute of Law Research and Reform

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March 6, 1989

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WH Hurlburt, QC

Dear Mrs. Harris:

RE: MR. RICHARD COTTER'S LETTER

You have asked for my comments on the proposals made in Mr. Richard Cotter's letter of December 30th to Ms. Waldbillig. This letter will give those comments.

Purpose of Bill 54

I will deal first with CMHC's general approach.

Under the heading "CMHC's Concerns Generally", Mr. Cotter says in effect that CMHC's suggestions are directed to giving protection to persons like CMHC and "the voiceless beneficiaries" of CMHC programmes by giving them remedies under Bill 54. The most important of these remedies are:

(a) the right to sue if the actions of an incorporated association are oppressive or unfairly prejudicial to them or if their interests are unfairly disregarded (a remedy which does not exist under Bill 54 but is available to certain classes under the BCA), and

(b) the right to ask for an investigation under Part 17 of Bill 54.

I would have to say that the approach suggested by CMHC is contrary to one of the basic policies advocated by the Institute and embodied in Bill 54.

The Institute's view is that the primary function of Bill 54 should be to provide machinery for the incorporation and operation of non-profit organizations. Included in that function is the provision of safeguards for minorities, because that relates to the corporate functioning of incorporated associations and there is no other appropriate place for it.

Beyond that function, the Institute thinks the bill should not go (though it made some minor exceptions). In particular, the Institute thinks that Bill 54 is not the place to provide for the regulation of charities. While CMHC programmes for, in effect, the subsidization of housing (which I think is what we are talking about) are not "charitable" in any usual sense, the same considerations apply to the expenditure of money under government programmes.

The implementation of the CMHC proposals mentioned above would, in my view, create the problems which the Institute foresees if Bill 54 undertakes the supervision of charitable and similar activities. The ways in which the proposals could be implemented are as follows:

(a) to make these remedies apply to all incorporated associations. That would mean applying them to other kinds of incorporated associations for reasons which have to do with incorporated associations which receive grants.

(b) to make the remedies apply to specific kinds of incorporated associations, such as soliciting associations or associations which receive grants. Every time the bill tries to define a class, it is likely to cause confusion and upset, as the Task Force will have noticed with respect to the "soliciting" and "prescribed soliciting" categories. Every time the bill adds a number of provisions which apply to one set of incorporated associations and not to another, the bill becomes more complex and more difficult for those who have to operate under it to understand.

(c) to confer remedies upon persons or governments who make grants, or upon classes of persons for whose benefits grants are made. I do not see why these should be a special class, and I can see difficulties in drafting provisions which will confer remedies only when the amount involved is large enough and while the association is still working on the grant. Then there is a major question as to why one class of persons with claims against an incorporated association should be preferred to another class who also have claims.

It is my hope that the Task Force will conclude (a) that charities and the administration of public monies be left to other legislation, and (b) that Bill 54 should not discriminate amongst classes of claimants against incorporated associations.

I will now move to Mr. Cotter's specific suggestions.

Strengthening Remedies

1. Investigation Orders

I should first mention that I have a problem about the references in this heading and others about memberships being held in trust. It rather looks as though Mr. Cotter is talking of an arrangement under which articles of incorporation would provide for benefits to beneficial owners of memberships. The purpose of this rather escapes me at the moment, but no doubt there is a purpose, and Mr. Cotter would not doubt clarify the reasons for it if you refer this letter to him. At the moment, I think that I would have to say that I would see no problem in principle with allowing the *beneficial* owner of a membership in an incorporated association to apply for an investigation under section 94(1). While efficiency requires that procedural provisions contemplate only members who appear in the register, there is no reason a person for whom a membership is held in trust should not have this particular right if the trustee would have it.

I would be extremely doubtful about allowing anyone to apply for an investigation who is not a member, whether registered or beneficial.

I think that Mr. Cotter is suggesting that if an incorporated association is established to assist refugees, any refugee could apply for an investigation. Presumably this would apply if the objects of benevolence included the municipal, provincial or national population, and, unless it applies only to certain defined classes of incorporated associations, it could affect even a charitable foundation established by an individual or family.

Making the investigation power available requires a balancing of interests. In the past, and in the present insofar as non-profit corporations are concerned, if a corporation mistreats an outsider, the outsider can sue the corporation and obtain a judgment if he has cause to sue. The investigation power is a powerful engine which can get inside the company, examine its records, compel its people to give information, and so on, and this can be done with a reasonable prospect that there will be no adverse effect on the applicant. It is true that the court has a discretion and should only order the investigation if there is quite a bad smell, but it still puts people in jeopardy and is a power which, in my opinion, should be made available only to those who are members of the organization itself.

It is true that the BCA makes it possible for "security holders" to apply for an investigation. It is also true that "security holder" is defined in terms which can be read as including an ordinary trade creditor. The Institute, when it recommended the adoption of the BCA, was reluctant about including any kind of creditor in the class which could apply for an investigation. We said at that time "we do not think that as a general rule a creditor should be able to apply for an investigation; however, the holder of a bond or debenture which can be converted into shares has a legitimate interest in the management of a corporation, and we can see also a case in which there is grounds for suspicion that a corporation (though still solvent so that it cannot be put into bankruptcy) has been set up as part of a scheme to defraud investors". We did not think that those reasons applied to incorporated associations and therefore did not include creditors, whether in general or only the holders of securities of kinds usually traded, in those whom we thought should have a right to apply for an investigation.

It should be noted that the Registrar has a power under section 94(1)(c) of Bill 54, to apply for an investigation. If there is an apparent abuse of an incorporated association's powers, the Registrar can make the application, and his legal right to make it gives him a standing from which he can try to persuade associations to change their ways without going to the extent of applying for the investigation. We doubt that this power will be often used, but it seems to us that that is where the protection of interests outside the association itself should rest.

In the result, under this head, I would not see any objection to the beneficial owner of a membership (assuming that there is a legitimate place for a trustee member and a beneficial owner) having the power to apply for an investigation, but I would hope that the Task Force would not go any further.

2. Oppression Remedy

Under BCA 234, a "complainant" may apply to the court for any one of a large number of remedies if a business corporation is acting in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a security holder, creditor, director or officer of the business corporation. The "complainant" who can apply is a present or past registered or beneficial owner of a security, a present or past director or officer, or "any other person who, in the discretion of the Court is a proper person to make an application under this Part".

The scope of the word "complainant" has some importance for this discussion. I think that it is clear that a trade creditor cannot apply *as of right*. The term "registered holder" was intended to exclude ordinary trade creditors. In a recent decision (*First Edmonton Place Ltd.* v. *315888 Alta. Ltd.* (1988) 60 Alta. L.R. (2d) 122, Mr. Justice D.C. McDonald of the Alberta Queen's Bench, held that it was restricted to creditors who hold securities which are capable of being registered under section 88.2(2) or (5) of the BCA and in the register of mortgages which a business corporation is required to keep. This does not include ordinary creditors.

It is, however, true that someone who cannot sue *as of right* can sue under BCA 234 if the court decides that he or she is a proper person to sue. In the same case Mr. Justice McDonald did say that an ordinary creditor might be a proper person in a case in which there is something amounting to a fraud on the creditor or where the act is unfair, having regard to the underlying expectations of the creditor in its arrangements with the corporation, the extent to which the acts were unforeseeable, whether the creditor could have reasonably protected itself, and the detriment to its interests. He said that in the absence of a *prima facie* case that an injustice would be done or that there would be an inequity if a creditor was not allowed to bring its action, leave to bring the action should not be granted. The judge thought that the test should reflect the desired balance the protection of a creditor's interest with the policy of preserving the freedom of action of a corporation's management.

It is, then, possible for an ordinary creditor to be allowed to bring an action alleging oppression by a business corporation. The possibility is however very restricted.

The main foundation for the oppression action is the position of a minority shareholder. Majorities and managements can exercise very great ingenuity in finding ways to favour the majority or management at the expense of the minority.

When the Institute considered this point in the project which led to the BCA, it was dubious about giving any kind of creditors, the "oppression" remedy and a minority would not have done so, being of the view that the proposed section might impose a new duty upon persons in control of a corporation towards outsiders and that it might end up by being an undesirable derogation from the principle of limited liability. The majority went along with the Canada Business Corporations Act provision. Their reasons were as follows: "Others see the holders of debt securities as being investors just as much as are the shareholders, and see the availability of the remedy as a protection against unconscionable disregard of the interests of those investors and as a factor in making investment more attractive". I do not think that those reasons apply to non-profit organizations.

So Bill 54 does not even make the remedy available to members. The reason, as indicated by Mr. Cotter's letter, was that it was thought that members in a non-profit corporation do not have an economic interest which requires protection (strictly speaking, the members of a single constraint incorporated association would have an economic interest, but an argument based on that kind of economic interest is much less potent than an argument based on the economic interests involved in business corporations).

In effect, the foundation of the "oppression" action is the terrible things that majorities can do to minorities, who are effectively at their mercy. The remedy oozed out to include the holders of a very narrow class of debt securities, and then, in order to cover an extraordinary case in which forethought had not been enough to include a deserving person, it went on to allow the court to enable a "proper person" to sue.

It is the Institute's view that, even for members, the initial foundation for the oppression action does not exist in incorporated associations, and that the remedy should not be provided to outsiders, bearing in mind that outsiders whose legal rights are interfered with can sue in their own right without coming into sue as an insider of the association.

It should also be noted that if management or a majority pillage an incorporated association, there will be a remedy under section 127. Most things that are wrongs to members of incorporated associations will be wrongs to the association itself. There is also section 135 under which a member can apply for an order directing those in authority to comply with the act, articles of incorporation or by-laws. It is the Institute's view that members are sufficiently protected by these provisions, and, as I have indicated, the oppression remedy was not really intended to go far beyond persons having a direct economic interest in a business corporation.

In the result, I hope that the Task Force will not recommend the adoption of an "oppression" remedy.

3. Disclosure of Beneficial Interests

Again, I am unclear about the trust relationship in relation to a non-profit corporation which cannot distribute money or property to its members during existence or on dissolution. Even if the articles of incorporation say that the purpose of the incorporated association is to give financial assistance to members and beneficial members (which would attract the protection of section 78(2) of Bill 154), I do not see what there is to which beneficial ownership can attach. Until I understand what is to be achieved by the notion of a trust not involving an economic interest, and the reasons for it, I cannot effectively comment on the proposal. Again, Mr. Cotter can no doubt explain the situation.

4. Incorporation by Reference

The choice between incorporation by reference and by setting out the provisions at length is one of convenience.

Taking section 34 first, the first reference is to Part 5 of the BCA. The incorporated parts include some 17 sections on some 10 pages. It applies only to incorporated associations with share capital. It is the Institute's view that the balance of convenience favours requiring the few to go to another statute rather than putting in this additional mass of material which is irrelevant to everyone else and will add to the apparent complexity of the statute.

Much the same can be said of Part 6 of the BCA. It includes 32 sections covering 18 pages. I do not see any difficulty with the reference in section 34(b) to applying Part 6 insofar as it relates to shares. Under section 79 of the BCA, Part 6 is incorporated as it relates to debt securities. The whole of Part 6 is therefore incorporated. The existence of the two references is merely because share capital was being dealt with at one place and debt securities at another, and, if it is confusing, a minor drafting change would correct the situation.

With regard to section 79 of Bill 154, the reason for incorporation by reference is much the same. I have mentioned Part 6, which deals only with issues of types commonly dealt with on securities exchanges or recognized as a medium for investment. Only rarely will incorporated associations get out issues of bonds, debentures and the like, and it seems better to send those who wish to do so to the BCA rather than to add to the length and complexity of Bill 54. Part 7 relates to trust indentures securing financial issues, and again will rarely involve incorporated associations. It does also include the requirement of registering mortgages given by corporations, but that is something for creditors to worry about and not those involved with incorporated associations. Part 8, dealing with receivers and receiver-managers, is also likely to be used only rarely.

Mr. Cotter's last paragraph under this heading relates again to trust deeds and declarations which create trust relationships between registered members or shareholders and the unregistered beneficial owners of memberships or shares. Again, since I do not understand the purpose of such arrangements, I do not understand the reasons for the proposals. In any event, they do not seem to me to relate to Part 7 of the BCA, as that has to do with borrowings by corporations and trust deeds executed to secure such borrowings.

I am not sure why a trustee member should not be a director or officer, but that again may have to do with the nature of the relationship involved.

Section 184 of the BCA deals with the right of a shareholder to be bought out when certain fundamental changes are made in the affairs of a business corporation. Again, this applies only where an incorporated association has a shareholder who has an economic interest, and it seemed better to the Institute not to confuse the issue by injecting the actual provision into Bill 54.

5. "Shares" and "Memberships"

There is no need for comment on this point at this time.

6. Distribution of Property and Income

CMHC would not permit the incorporation of an incorporated association the property of which could be distributed among members upon liquidation. It does not give a reason.

For a hundred years, Alberta law has allowed the incorporation of such non-profits, and I am not aware that any real case has been made for abolition of the "mutual benefit" non-profit organization. A granting agency which wants to avoid making a grant which might possibly find its way into the pockets of the members of an incorporated association will, it is true, have to assure itself that the double constraint is there. It has to do that now, and I doubt the advisability of depriving people of the right to incorporate for, say, a golf club, in order to save that inconvenience.

7. Goods and Services

I am not sure what the purpose is behind putting in "on an occasional basis". Presumably it is to prevent abuse. I would be doubtful, however, about the proposal. A property owner, for example, may rent premises to an incorporated association of which he or she is a member, at a lower than market price, and I rather doubt the desirability of saying that that cannot be done (as I think that it would soon cease to be "occasional").

I am not quite sure what Mr. Cotter has in mind in the concluding words under item 7. Section 25(3)-(5), as part of Part 5, will apply to incorporated associations with shares. We do not see the need for these provisions to apply to membership associations. If experience has shown that lack of similar provisions in the Societies Act has led to an evil which should be cured, the Institute might reconsider this position.

8. Financial Assistance

The deletion of section 78(1) of Bill 54 would not achieve CMHC's purpose, as there would then be no prohibition other than those dealing with the distribution of property. What would accomplish CMHC's purpose would be the deletion of the last part of section 78(1), commencing "if there are reasonable grounds for believing that ...".

Since the Institute's original proposal was pretty well what CMHC suggests, I would have some difficulty in objecting to the proposal. It was a decision taken somewhere in the Government which made the prohibition apply only if the liquidity and solvency tests are not met.

9. Directors' Liabilities

Again, the issue of shares is a much smaller component in the affairs of non-profits than it is in the affairs of business corporations, and I am not aware of abuses. The same remarks apply to buying in shares and paying commissions on shares. Dividends are forbidden anyway, and I think that a director who declared one would be liable under a recent Court of Appeal decision. Generally speaking, the provisions of section 113 do not really seem to me to be suitable for non-profits.

Section 114 of the BCA deals with liability of directors for wages. The Institute did not recommend the imposition of a similar liability (which is not in the Societies Act) for two reasons. One is that where directors are involved in a commercial operation, there is more reason to think that, vis a vis employees, they should be responsible for wages, than is the case with volunteer directors. The second is that liability of directors and officers is dealt with in section 108 of the Employment Standards Act, and that seemed to us to be a better place to have it.

Section 118(1) of the BCA puts an onus on a director to show that he did not consent to a resolution adopted at a meeting at which he was present. Section 118(3) allows a director to rely in good faith on financial statements and expert opinions. I do not think that the Institute had strong feelings against including similar provisions in Bill 54, but thought that there might be less clutter in the Act if proceedings of directors were left to by-laws under section 47.

10. Unanimous Shareholder Agreement

Under the BCA, if all the shareholders enter into an agreement about how a business corporation's affairs are to be run, the agreement is binding, and it cannot be changed without the consent of all the shareholders.

The main reason that the Institute recommended the adoption of the unanimous shareholder agreement by the BCA was that it would enable what is really an incorporated partnership to substitute their own rules for those laid down by the BCA. The wording adopted is more flexible than that, but that is really in order to make the tool as useful as possible.

We were uneasy about the unanimous shareholder agreement. One reason is that it would be possible for a small group of shareholders to impose an iron constitution on a business corporation which would be to the disadvantage of a larger group later on. We thought, however, that the advantages for legitimate users would outweigh the disadvantages. In order to ameliorate the disadvantages, we worked out an elaborate series of protections for later members. BCA section 140(2) allows a person who buys shares from a business corporation in ignorance of the existence of the unanimous shareholder agreement to rescind the purchase. If he buys the shares from someone other than the corporation, a purchaser, when he finds out about the agreement, can send a notice of objection and is then entitled to be paid out on the same basis as a minority shareholder is entitled to be paid out when there is a fundamental change in the operation. A later subsection imposes on a shareholder the liabilities of a director if the unanimous shareholder agreement gives the shareholders the powers of a director.

When it came to thinking about non-profit organizations, it seemed to us that the area of legitimate use of the unanimous shareholder agreement is, at best, much smaller. The unanimous shareholder agreement is specifically intended to destroy corporate democracy, while democracy should be encouraged in most non-profit organizations. It seemed undesirable to us to allow a small group to rivet its control on a floating and changing body of members into the future. Because the unanimous shareholder agreement is so effective a tool, it should not be used without competent legal advice. Once it is signed it is cast in stone unless the signature of all members at a given time can be obtained, and, bearing in mind the floating nature of the membership of many non-profit organizations, it will often be impossible to do anything about such an agreement.

It is the power of the tool which makes it attractive to CMHC. I think that I would have to say that this is really too much power for even the most benevolent emanation of a government to have.

Yours sincerely,

W.H. Hurlburt

WHH/cr

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Edmonton, Alberta
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Dear Sirs:

Re: Volunteer Incorporations Act

Submissions have been solicited from the public as to Bill 54 relating to Volunteer Incorporations. I respectively submit the following for consideration:

1. Section 25 deals with the authority of directors, officers and agents. It repeats in effect what presently exists in the Business Corporations Act. The effect of that section is that the authority of directors and agents can be accepted without the necessity of checking whether or not the internal management rules have been applied. This is a good suggestion in principal. However, it is qualified by the words "unless a person has, by virtue of his position with a relationship to the incorporated association ought to have, knowledge of the facts at the relevant time". On the one hand, members of the public can deal with confidence and certainty with a volunteer association without any concern about whether or not authority will be questioned. The quoted part, however, detracts considerably from that certainty. The question of whether or not a person has or ought to have knowledge once again puts matters

* DENOTES PROFESSIONAL CORPORATION

of authority in question. In dealing with the Business Corporations Act, I have encountered difficulties with giving advice because of the uncertainty which these words add to the Act. I respectfully suggest that the provision instead should read that the authority of the agent etc. is unquestioned unless it is proved by the person challenging the authority that the person dealing with the association in fact knew that there was a defect in the authority. This will effectively place the onus on the person challenging the authority to

2. Sections 27 and 28 deal with a record and registered office, these sections again repeat in effect what is found in the Business Corporations Act. I have found from my practice that there is often neccessity for a duplication of records. It may also require the registered office which is often a solicitor's office to maintain bulky financial records. I suggest that the Act provide that financial records and statement need not be kept at the registered office provide that there is a record at the registered office o where these financial records are available. Furthe where there is both records and a registered offic any documents kept at the registered office need no then also be kept at the records office.

3. The Bill contemplates that certain financial record will have to be furnished by a "solicitin incorporated association". The Act itself shoul contain the definition of what this type o association is rather than leaving it to a regulation as is provided in Section 1(v)(ii).

4. In my experience with societies and voluntee organizations, one often finds a situation where th members are totally dissatisfied with a decision o the directors. Normally, if directors reach decision that, decisions cannot be overruled by th members, research at any rate in regards to busines corporations, indicates that the members are bound b the director's decision even if an overwhelmin majority is not satisfied with it. Because of th volunteer nature of the type of organizations tha your task force will be investigating it seems tha there should be more control vested in the members. suggest that in the section dealing with meetings tha there be a provision that the members can insofar a practical overrule any decision of the directors b special resolution. The reference to "insofar a practical" would cover the situation where a decisio has already been reached and brought into effect b

the directors and for practical purposes is not reversible.

Yours truly,

H.I. SHANDLING

HIS:rn

Institute of Law Research and Reform

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March 1, 1989

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Dear Mrs. Harris:

RE: MR. H.I. SHANDLING'S LETTER

I will comment on the proposals made by Mr. H.I. Shandling, Q.C.

I should, by way of general comment, say that Mr. Shandling's suggestions should always receive careful consideration.

Authority of Directors, Officers and Agents

The basic purpose of section 25 of Bill 54 is to protect a person who deals with an incorporated association. If someone looks like a director or agent of the association, acts like a director or agent and talks like a director or agent, an outsider is entitled to infer that the person is a director or agent, and the incorporated association will be bound even if it should appear that there is some hidden defect in the person's authority. Mr. Shandling's statement of the purpose of the section is entirely accurate.

Obviously, someone who knows that the appearance of authority is wrong should not be able to rely upon the appearance of authority, and the association should not be bound by what the alleged director or officer did. Mr. Shandling agrees with this. He says however that that is as far as the exception should go.

Section 25 takes the exception one step further. If the outsider "by virtue of his position with or relationship to the incorporated association *ought to have knowledge*", then the outsider cannot rely on the appearance of authority.

The thrust of Mr. Shandling's criticism, I think, is that the "ought to know" exception creates a grey area. He says that he has trouble advising people because of the greyness. I take it that his problem is to advise whether an outsider can rely on something having been done properly -- the granting of a mortgage, the entry into a contract -- or whether the outsider, because he "ought to know" things, must go behind the appearance and see whether in fact the proper corporate machinery has clanked.

My inclination is to put up with the greyness.

It is difficult to prove that someone in fact knew something at a given time. It seems to me that if a person stands in a close relationship to an incorporated association, that person should have a responsibility of seeing that things have been done properly. It is only persons who "ought to have knowledge" who would be caught by the extended exception. There would have to be something in the relationship or in the office held which would be expected to bring actual knowledge to the mind of the person who is dealing with the association.

I have a secondary point. I do not see that the Volunteer Associations Act should be different from the BCA on the point. There is value in having the two stay together unless there are specific reasons, based on the business nature of one kind of corporation and the volunteer nature of the other, why there should be a difference. My inclination would be, under these circumstances, for Bill 54 to track the BCA unless and until the BCA is going to be changed.

The Task Force would not be doing any great harm to the nature and structure of Bill 54 if it were to follow Mr. Shandling's suggestion.

Records

I do not think that I understand Mr. Shandling's problem here. Section 28 of Bill 54 requires records to be kept at an incorporated association's "records office". If an incorporated association has designated a separate records office under section 27(1)(b)(ii), the records must be kept at that separately designated records office. If the incorporated association has not designated a separate records office, then the records must be kept at its registered office.

This does not seem to me to require duplication of records, as there is no requirement to keep the records at the registered office if there is a separately designated records office. It does not seem to me that this requires records to be kept at the solicitor's office, because the separately designated records office may be elsewhere.

It may be that I have missed something here, but that could be ascertained by putting what I have said to Mr. Shandling for comment.

Definition of Soliciting Incorporated Association

Depending upon what the Task Force recommends and the Legislature enacts, this point may disappear. In general, I would agree that definitions should be in the statute, and the Institute's recommendations did not actually provide for regulations which would differentiate among soliciting incorporated associations. I can however have some sympathy for the Government's position on the point. The greatest problem is the call for formal audits, and the question where the line should be drawn above which the cost of a formal audit will have to be incurred is one of some difficulty and one which, when drawn, may well require reconsideration before too long.

I think that it may be possible to answer Mr. Shandling by saying that what is in question is not so much a definition, as of saying what class of associations the audit requirements and one or two other things should apply to. I suspect however that it may not be necessary to deal with his specific suggestion, because the point will be dealt with in some other way.

Over-ruling the Directors

In most cases, as Mr. Shandling says, the members of a society cannot over-rule a decision of the directors, at least directly. The rule is stronger in the case of business corporations, because BCA section 97(1) says that the directors "shall manage the business and affairs of a corporation", and this is subject only to a unanimous shareholder agreement, that is, an agreement entered into by all the shareholders.

I should think that a society under the Societies Act could have a by-law which would allow members to over-rule directors. I have not checked into the law, but I think that this would be right.

Section 48(1) of Bill 54 says that the "directors shall manage the activities and affairs of an incorporated association". Although the subsection does not purport to confer powers, I think that the powers follow the duties, that is to say, that the directors, if they must manage, must have power to manage.

However, section 48(1) starts with the words "Except as otherwise provided in this Act, the articles or the by-laws ...". This was intended to allow either the articles of incorporation or the by-laws to take powers away from the directors, and I think that it achieves the purpose. I therefore think that, if an incorporated association wanted to allow the members to over-rule the directors, it could do so by appropriate provisions in the articles or by-laws. These could be added at any time by special resolution.

There is another way in which the members of an incorporated association could assert their will. Under section 44(4), the members would have the power to remove a director at any time by ordinary resolution. They could use this power to remove the directors and elect new ones. The by-laws would presumably provide, or could be made to provide, for the election of replacement directors.

The removal and replacement of the directors is an atomic bomb kind of remedy, and it is probably no answer to Mr. Shandling's suggestion. The ability to have a power to over-rule in the articles or by-laws may be a partial answer. The power to amend the by-laws may be a more significant answer.

There is a possible rejoinder to both answers. It is that people don't put that kind of power in the by-laws, that members are not likely to be aware of their power to amend the by-laws to put in such a power, and that if they are aware of their power, there are procedural difficulties in the way of getting a special resolution to a meeting and getting it filed with the Registrar, both of which would have to be done before the members could pass an over-ruling resolution.

Since Bill 54 would allow knowledgeable members to have articles of incorporation or by-laws which would confer an over-ruling power on the membership, the question is: What should the statute do if the articles and by-laws are silent? The answer depends on policy: Should the statute facilitate control by members, or should it emphasize the control of the elected representatives of the membership?

I do not think that the remarks which I made earlier about tracking the BCA apply here. I doubt that anyone will get trapped if Bill 54 does not track the BCA on this particular point, and it is quite possible to take the view that in a volunteer organization there should be more direct grassroots control than in the case of a business corporation, where business efficiency can be said to require a more centralized control.

My own inclination would be to leave Bill 54 as it is, and to include in materials which are made available to old and new incorporated associations the information that associations can provide for greater control of the directors by the members. However, I cannot say that Mr. Shandling's suggestion is wrong, that it is pernicious, or that its adoption would injuriously affect the framework of the statute or of incorporated associations.

If something is put into the statute, some careful attention would have to be given to the drafting so as to make it clear that a retroactive over-ruling of the directors would not upset dealings with outsiders. That I think is what Mr. Shandling has in mind when he qualifies his suggestion by saying that the over-ruling would be "insofar as practical".

Yours sincerely,

W.H. Hurlburt

WHH/cr

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We are writing to you in response to your request for comments on Bill 54, the Volunteer Incorporations Act (the "VIA").

Our firm engages in the general practice of law. We have from time to time represented a number of societies, Part 9 companies, and other not-for-profit entities. We are not, however, writing to you on behalf of any particular client, rather these comments are the collective comments of the firm. We will however provide examples from our experience when appropriate.

First of all, we would like to say that we support and applaud the intended reform. We agree that the time is right for a restatement of the law in this area, and our comments should not be taken otherwise. It is the nature of submissions like this that they tend to emphasize what is wrong with the proposed reforms, while overlooking what is good.

The following comments generally follow the organization of the Act.

Definitions

The only comment we would make with respect to the definitions relates to the term "soliciting incorporated association". Much of the content of this section will be found in the regulations, which are not yet drafted. We would recommend however, that the definition of solicitation include the receipt of funds from another incorporated association. We are aware of a number of corporations that could be described as private charities, and which exist solely to distribute the income from a pool of capital to other registered charities. Incorporated associations that receive

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gifts from such charities should be considered as soliciting incorporated associations.

In addition, the definition of soliciting should make it clear whether receiving annual membership fees or dues from the members constitutes "soliciting money from the public". The receipt of funds, from government or otherwise, on a "fee for service" basis should be excluded.

Incorporation

Section 5 of the Bill provides that an incorporated association must either prohibit the distribution of income to its members during its existence, or it must prohibit distribution both during its existence and on liquidation. This would appear to prevent a so called "mutual benefit society" from using the Act, except to the extent that the benefits can be distributed indirectly to the members. We draw this to your attention simply because some portions of the report prepared by the Institute of Law Research and Reform seemed to indicate that the Act was to encompass all different types of not-for-profit corporations. We understand that section 78(2)(a) was intended to accommodate mutual benefit societies, and we wonder whether the inclusion of this provision does not reduce the restriction in section 5(a) to mere verbiage. We would suggest that the place of mutual benefit societies under the Bill be reconsidered. Perhaps section 78(2)(a) should be removed and these societies be required to operate under the Business Corporations Act (the "ABCA"). Perhaps section 5(a) should be removed from the Act, so that all incorporated associations have a section 5(b) limitation.

We would also point out that section 6(1)(b), which provides that the incorporated association can pay a member the "fair value" of his membership, considerably weakens the strength of section 5. It would apparently be possible to circumvent section 5 by resigning one's membership for a fair value and then rejoining the next day. There is nothing that states that new members may only join at "fair value".

In addition, clauses 6(1)(c) and 6(2)(d) might be the source of some abuse as well. The incorporated association could provide financial assistance to a member, and then forgive the debt or otherwise decline to pursue its rights, thereby conferring a benefit on the member in breach of the spirit of section 5.

Sections 6(2)(c) and 22 are the closest that the Act comes to incorporating the equitable doctrine of cy-pres. We would suggest that consideration be given to widening the scope of this provision. It should perhaps be an implied object of every incorporated association, whether stated or not. It should certainly be considered as an implied provision for any existing company which falls under section 10. Such a company may well have a provision similar to section 5(b), so that it will not fall under section 10(3), but it may not have a provision like section 6(2)(c). This could create some difficulty on the eventual liquidation of the company. If nothing else, we would suggest that the Court be given a power on liquidation or dissolution to in effect divert the assets of the company to similar objects, if that appears to have been the overall intention of the members and founders of the incorporated association. This would require replacing the presumption in section 20(b) with a provision similar to section 22.

With respect to incorporated associations with share capital, we believe that another provision is required to make section 5 effective: the shares should only be transferable at a set value. If this is not the case, the prohibitions in section 5 can easily be subverted by trading the shares. It would perhaps be wise to require that all incorporated associations with share capital have only par value shares. This would be complemented by a provision that the shares could not be transferred except for the par value. With respect to section 6(1)(b), the reference to "fair value" should be a reference to "par value". With respect to incorporated associations that do not have share capital, this reference to fair value would more appropriately be a reference to the amount paid by the member for his membership.

In any event, the amount to which a member is entitled under section 6(1)(b) (or any of the other "fair value" provisions in the VIA) should never exceed any limitation provided for in the Articles.

We would also suggest that section 6(2)(b) apply to section 5(a) incorporated associations as well.

Names

However descriptive it may be, the term "incorporated association" is a clumsy moniker. We are unable to see any reason why traditional names such as foundation, society, and club cannot be used by incorporated associations.

It is obviously desirable to give notice to the public of incorporation, but this could easily be accomplished by requiring an incorporated association to have the abbreviation "Inc." at the end of its name, as in the "XYZ Foundation Inc.".

While one member of our firm supports the inclusion of section 12(3), the majority are unable to see any reason for the prohibition contained in section 12 (3). The only purpose that this would serve would be to give the public automatic notice of whether the company is incorporated under the ABCA, or under the VIA. Generally, public policy only requires that the public be given notice that they are dealing with a limited liability entity. We are unable to see why the terminology mentioned in this section cannot be used by incorporated associations. Anyone who is interested in knowing under which statute the company is incorporated can easily search the register. It would be more to the point to prevent ABCA companies from using "club", "society", "foundation" and similar names.

We find section 12(6) to be unduly restrictive. A number of cultural groups may wish to use a heritage language in their name, and we see no reason why this should be prohibited within Canada, so long as there is an English or French equivalent name designated.

Effect of Incorporation

It is intended by section 17 that the liability of members of incorporated associations be limited. The Bill however overlooks the fact that many incorporated associations have arrangements allowing the association to levy dues from their members. The legal status of such arrangements is questionable, and they may not in fact be enforceable. This is a concept quite foreign to the ABCA (see section 25(2)), but contemplated by section 33(3) of the VIA, and it provides a serious inroad into the concept of limited liability.

If an incorporated association was to become dormant, the outstanding dues owed by its members would accumulate year by year, and the members might become liable to the incorporated association for significant sums. If the incorporated association was then to be reactivated, it or its creditors might attempt to enforce these debts. Some incorporated associations might provide for automatic termination of membership on nonpayment of dues, but others would provide only a discretionary termination, and some incorporated associations might not deal with the matter at all.

A situation could also arise where the incorporated association would levy much larger dues than it traditionally had, and some members might not agree with that decision.

In order to deal with these problems, we feel that section 17 must be supplemented as follows:

(a) the Bill should provide that where an incorporated association has the power to levy dues, membership will automatically cease upon nonpayment of 2 years of dues.

(b) a member terminated under the previous provision would have the right to reinstate his membership by paying up the arrears.

(c) the Articles of an incorporated association should be required to state whether or not there is a power to levy dues, and any limits on that power.

(d) a member would have the right to "dissent" from the levy of any periodic or special levy. The member would have to dissent within 30 days of receiving notice of the levy, and the member would be required to resign membership contemporaneously with the dissent.

As the Act is presently drafted, an incorporated association with the power to levy dues would bear some of the characteristics of a company limited by guarantee. In this respect, we would draw your attention to section 193 of the Companies Act, which attempts to deal with some of the problems we have raised.

We note that section 34(a) of the VIA appears to incorporate ABCA section 25(2). This would mean that shares would not be assessable for membership dues, but this is inconsistent with several sections of the VIA (such as 31(3)) which directly contemplate levies on the members. For the reasons outlined above, section 25(2) cannot simply be excluded from the VIA to deal with this problem.

Returns

It would be useful if section 29 applied to all corporations not required to file returns under some other statute. The bulk of these would be corporations incorporated by Private Act of the Legislature. A limited number of provisions of the Act could be made applicable to these companies, for example sections 141 to 143, and perhaps all of Part 18.

Membership

Section 31(3) should be expanded so that the rules of natural justice extend to disciplinary action short of termination.

Section 34 of the VIA incorporates a number of provisions in the Business Corporations Act. We feel that this is against the intention of the Institute of Law Research and Reform, which was to make the VIA easy to administer for incorporated associations without access to legal advice. Most such incorporated associations will not have ready access to the Business Corporations Act. For this reason, and the reasons that follow, we feel that the appropriate parts of the ABCA should be reproduced in the VIA.

We are also concerned by the clause in section 34 which provides that it operates "notwithstanding anything in this Act". The section then goes on to incorporate provisions of the ABCA which are directly in conflict, for example, with VIA section 5. For example, section 24 (3)(b) and (c), and section 24(4)(b), provide for dividends and distribution of assets, which is completely inconsistent with section 5. In addition, provisions such as section 27(2) relating to cumulative dividends simply have no application at all.

A number of provisions in ABCA, Part 5, cause us concern. Section 25(2) of the ABCA provides that shares are nonassessable. As we have indicated, many incorporated associations have the power to levy dues on their members. Section 25(2) would be quite unworkable for many of them.

We have also indicated that shares of incorporated associations should perhaps only be par value shares, which conflicts with section 24(1) of the ABCA. In any event, the flexibility to have par value shares should be preserved. Many of the provisions of section 26 that are primarily directed at protecting creditors from depletion of assets through distributions to the members are simply inapplicable. Section 30, which prevents a corporation from holding its own shares, may also cause difficulties to those incorporated associations that keep a "bank" of their shares for distribution to new members. These incorporated associations will often buy back the share from a retiring member, and then sell them to new members, as a convenient way of transferring memberships. We can see no reason why an incorporated association should have to comply with the notice provisions of section 32(3) in these circumstances. Consideration should be given to replacing all of sections 30 through 33 with a simple provision such as that contained in section 34, supplemented by a few provisions such as that contained in section 31(3).

We notice that section 33 of the VIA does not apply to associations with a capital stock. It is our view that a member of an incorporated association should be entitled to surrender his membership at any time. Either section 33 of the VIA should be amended to apply to corporations with share capital, or section 35(1)(a) of the ABCA should be made mandatory for incorporated associations.

The incorporation of Part 6 "as it relates to shares" is complex, even for someone trained in the law. Again we would recommend that the applicable provisions be reproduced in the VIA. For example, section 45(7)(b) of the ABCA simply does not apply. In addition, part 6 contains numerous references to unanimous shareholders agreements, which are dealt with in part 11 of the ABCA, and which do not seem to have any place under the VIA.

Finally, as we have mentioned above, we have some reservations about the dissenting shareholder provisions of section 184 being applicable to the VIA. The concept of "fair value" is one of economic value, and it is more properly applicable to business corporations. We have some difficulty in reconciling this concept witn sections 5 and 6 of the VIA. We do not believe that a dissenting member should ordinarily be entitled to anything other than what an ordinary retiring member is entitled to. The suggestion that a dissenting member has some sort of economic stake in the incorporated association is in conflict with the concepts behind section 5, and we are unable to see how the Courts would set a "fair value" on membership. For example, we are aware of an existing Part 9 company that provides that its shares can only be traded for $5.00. This amount has been fixed for over 75 years. Does VIA contemplate that a dissenting shareholder of this company could obtain some higher value based on the "fair value" of the company's assets?

If section 184 is to be incorporated, we would suggest a reconsideration of the triggering mechanisms in the section. Section 184(1)(b) should be expanded to include a change in purposes, and any change in the section 5 restriction, or the power to levy dues should trigger a right to dissent. Section 184 is made "subject to sections 185 and 234", and goes on to mention several other sections of the ABCA. Are all these other sections to be indirectly incorporated into the VIA as well? We would suggest that a redraft of section 184 be set out right in the VIA, if it is to be retained at all.

On the other hand, we see one obvious deficiency in the Bill, which can be discussed here as well as anywhere. While we think that the concept of paying off a dissenting member is foreign to the overall intentions of the VIA, the VIA does not deal with another more common problem. This is the situation that arises when a schism develops within an association, and one faction attempts to leave the association with all or a proportionate part of the assets. (See as an example Wawrzyniak v. Jagiellicz (1985), 65 O.R. (2d) 384). It would be desirable to give the Court some power to deal with situations of that sort, and preferably, also some guidelines to be followed. As the Bill presently stands, a faction such as this might seek to use section 6(1)(b), or they might attempt to dissent in mass under section 184. These would be somewhat clumsy provisions by which to deal with this sort of problem.

In summary, we would suggest reconsideration of the advisability of incorporating section 184 at all, and we would also suggest consideration of the advisability of some method of dealing with schisms in the organization.

With respect to section 36 of the VIA, it is not entirely clear whether a provision under section 6(1)(b) would fall within the meaning of section 36(a). In any event, in a company with an income distribution restriction only, we are not sure that it is appropriate that death should result in forfeiture of membership in all cases.

Directors

Section 1(1)(f) provides that "director" means a person occupying the position of director "by whatever name called". In fact some incorporated associations do not have directors at all, but are managed by "the executive". It might therefore be appropriate to add a provision to Part 9 that the by-laws may confer the powers of the directors on another body, in which case that body will be dealt with as the Board of Directors, and the members of that body will be considered to be directors.

There is an important difference between section 75 of the Companies Act and section 44 of the VIA. Section 75 speaks of the "appointment" of directors, whereas section 44 speaks of "election". In addition, section 44 seems to contemplate election of directors by the members as being the only mechanism of appointment. It is in fact quite common for incorporated associations to have some directors elected by the members, and other directors appointed by various interest groups. We are aware of one Part 9 company which has 18 directors elected by the members, two appointed by the Government of Canada, two appointed by the Government of Alberta and four appointed by the local municipality. The directors so constituted are then entitled to appoint another four directors. In other companies a person may automatically be a director ex officio. We believe that this sort of flexibility should be preserved in the VIA, and section 44 should be amended accordingly.

We would also point out that Part 9 of the VIA appears to contemplate only one class of directors. We are aware of at least one Part 9 company which has directors, associate directors, and honorary life directors, each with different powers and rights. We would accordingly suggest that a provision similar to section 30 be inserted in Part 9 to apply to directors. Section 44 (5)(f) is the only provision that attempts to deal with this issue.

Powers of the Directors

Section 48 gives the general power to manage the incorporated association to the directors. This would appear to be an appropriate place to discuss another provision that we feel could be usefully added to the Act.

The VIA contains nothing equivalent to the unanimous shareholders agreement found in the ABCA. We do not think a unanimous shareholders agreement provision would be all that useful, but we do see the utility of an analogous type of agreement between the incorporated association and third parties.

It is not uncommon for incorporated associations to enter into contracts with governments, other incorporated associations, or major sponsoring groups. It would be very useful to have a mechanism in the VIA that recognizes these agreements, especially when they go so far as to deal with matters that are ordinarily provided for in the by-laws.

We would accordingly propose that the Act provide that the incorporated association may override the by-laws and articles by contract, and that the incorporated association be empowered to do the following things:

1. agree only to pursue its purposes in certain ways.
2. agree to manage its affairs or deal with its assets in a certain way.
3. agree that certain bodies shall have the right to appoint directors to the incorporated association.
4. agree that the incorporated association will not amend its articles or by-laws without the consent of another party.
5. generally agree on any matter that might otherwise be dealt with in the articles, with suitable limitations, such as that the association may not contract to violate Section 5.

To illustrate how this might work, a major foundation might agree to contribute an amount of money to an incorporated association, if the foundation could have two seats on the board of the incorporated association. The foundation might also insist that the provision in section 6(2)(c) be to the effect that the assets would be returned to the foundation. Finally, the incorporated association might agree not to amend its purposes, or change the structure of its board of directors, without the approval of the foundation. We can see no public policy objection to provisions like this, and in fact we believe that they are quite common in the voluntary sector.

To return to the detail of section 48, we are unsure why section 48(2)(a) contains mandatory wording. It might well be the case that an incorporated association is deliberately set up without any power in the association or the directors to borrow money. We see no reason why an incorporated association should not be able to decide to deal on a "cash only" basis, especially where there is a power to levy dues.

With respect to section 50, we well recognize the need for conflict of interest guidelines for directors and officers. We would however suggest that the section be made somewhat more flexible, by providing that the by-laws can impose other restrictions on conflicts of interest, or could provide some guidance as to what constitute "material contracts". We are aware of one part 9 company which operates races for prizes. There is a provision in their articles that a director or officer can compete in those races, and receive the advertised prizes notwithstanding the conflict of interest guidelines. This flexibility should be preserved.

Section 51 provides for the standard of care expected of every director. We are generally in agreement with this section, although we would point out that the wording of section 51 (1)(a) may impose upon the directors the obligation not to compete with the incorporated association. In the case law, this has been interpreted to mean that a director who comes across an opportunity must first present that opportunity to the company. We are not sure whether this is appropriate in the volunteer context, as directors may well belong to several incorporated associations with similar objects. In any event, we see no reason why the directors should not be allowed to pursue these opportunities on their own.

Financial Affairs

We agree that not every incorporated association should have to appoint an auditor. In particular, the regulations under section 68 should define the corporations affected by a dollar limit. While it is undoubtedly an expectation of the public that funds donated to an incorporated associations will be properly applied, it is also the expectation of the public that excessive sums will not be spent on auditors. We would accordingly suggest that the prescribed soliciting associations be those that receive more than $10,000.00 from the public in the current or the previous year.

Where an incorporated association is a soliciting incorporated association under section 1(1)(v)(ii), section 68(2) might allow the government to waive the audit.

While we appreciate that auditors should be independent, section 69(2)(b)(i) may create some problems. Where a chartered accountant is a member of the board of an incorporated association, it is not uncommon for him or his firm to agree to do the audit on very favourable terms. Such a person would violate the independence provisions of the VIA, but because of the regulation by their professional bodies, there is really little risk. We would accordingly suggest some further flexibility in this area.

With respect to section 78, we have already mentioned that it contains the potential for subverting the intention of sections 5 and 6.

Further, we find the provisions of section 78 (4) to be somewhat unusual, if the purpose of section 78(2) is indeed to allow incorporated associations to give benefits when the giving of benefits is one of the purposes of the association. Traditionally, the recipients of charitable assistance have remained anonymous, and we are unsure what purpose this subsection is supposed to serve.

Finally, we would point out again that section 5 of the Act does not really allow for a mutual benefit society. Even though the distribution of benefits to its members would be one of its purposes, and therefore apparently permitted under section 78(2), section 5 would appear to prevent the distribution of profits to the members. Some greater thought must be given to the place of mutual benefit societies under the Act, or section 5 will be reduced to mere verbiage. Perhaps section 5(a) is an unnecessary complication, and can be completely removed.

Debt Securities

Section 79 is similar to section 34 in that they both incorporate sections of the ABCA. However, we feel that the provision in section 79 is appropriate, because any incorporated association borrowing money as contemplated will be operating at a very sophisticated level, and it will have need of the sophistication of the ABCA.

Fundamental Changes

We would suggest that section 80 (2) provide that the amendment cannot be made without the leave of the Court. Situations are certain to arise where it will be appropriate to remove the provision in section 5(b), and the Court should be able to impose conditions that will make such a change fair.

One fundamental change not provided for is the continuance of an ABCA company under the VIA. We are aware of one company incorporated by Private Act that owns an ABCA company. Both are not-for-profit companies, and the parent would like to continue the subsidiary under the VIA. Another Part 9 company of which we are aware owns an ABCA company. They would like to continue the ABCA company under the VIA, and then amalgamate the two. We see no reason why this should not be allowed.

Investigation

We support the inclusion of the investigatory provisions in the Bill.

We would point out that under section 223 of the ABCA, a "security holder" may apply to the Court for an investigation. The definition of security includes debt instruments of the company. Under section 231, a former registered owner of a security is also entitled to apply to the Court.

Section 94 of the VIA does not cover creditors, and under section 126 creditors could only apply in the discretion of the Court. We would also point out that a member of the public who has made a donation to the incorporated association does not appear to have any standing at all, except possibly under section 126(b)(iii).

We would suggest that the scope of section 94 and section 126 be expanded to cover creditors of the incorporated association, and we would also suggest that any person who has made a donation to the incorporated association have leave to apply under these sections. There will undoubtedly be occasions where someone has made a substantial gift to an incorporated association, and they subsequently feel that the funds donated have been misapplied.

Further, the Attorney General has always had a role to play in the regulation of charities. We would accordingly suggest that the Attorney General have the right to apply under section 94 and section 126, and we would also suggest that the Attorney General be given notice of any application under either of these sections.

We would also suggest that section 110(1)(b) is very narrowly drafted. The Court should perhaps have this power on any breach of the Act, but reference should certainly be had to a breach of section 5 or 6.

For the reasons given above, we would suggest that section 111(1)(a) be expanded to include oppression of any person who has made a donation to the incorporated association.

With respect to section 114, we would suggest an express inclusion of a reference to the powers granted in section 22. We would also question whether the presumption in section 20(b) should not be removed, so that all assets not specifically dealt with in the Articles will be distributed by order of the Court. Instead, with respect to incorporated associations which have a section 5(a) provision, the Court might, in addition to the powers given in section 22, have the power to distribute the assets to the members of the association if it thought that appropriate.

With respect to section 117, we would suggest that the liquidator be required to give notice to any person who has made a donation in excess of $500.00 to the incorporated association within three years of the date of his appointment. Notice of a proposed liquidation should perhaps be given to such persons no matter which form of dissolution is being used (for example under section 108(7)(a)).

With respect to section 120, we would draw your attention to our earlier comments about the appropriateness of attempting to set a "fair value" on a membership. Once again we find this type of provision rather incongruous in a statute of this sort.

Securities Act

Consideration should be given to the interaction of the VIA and the Securities Act. Selling memberships or shares should not be considered a trade or distribution, even if to more than 50 persons.

Conclusion

We trust that you find our comments of interest. Members of our firm would be pleased to meet with or correspond with the Task Force with respect to any of the issues we have raised.

Yours truly,

McCUAIG DESROCHERS

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March 6, 1989

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Dear Mrs. Harris:

RE: MR. F.F. SLATTER'S LETTER

You have asked for my comments on Mr. Slatter's letter of December 28th to Ms. Waldbillig. My general comment is that Mr. Slatter has put Bill 54 under a microscope. Each of his comments merits careful consideration. I am personally in agreement with a number of them.

Definition of Soliciting Corporation

The Institute did not think about the incorporated association which receives money from another incorporated association. I would not personally be very troubled if the Task Force should recommend the extension. However, on the whole I would not extend it myself.

I think that there is something to be said for the proposition that the expenditure of funds impressed with a public interest should be audited, which is the principal significance of the "soliciting" incorporated association, or whatever distinction ends up. However, it seems to me that a private charity can, if it wishes, require an undertaking to have an audit as a condition of its grant to an incorporated association. It may be said in rejoinder that a government granting agency can do so, and the receipt of government grants will attract the "soliciting" label and consequences. I think however that it is appropriate to take the view that money which comes from the public (at least, in sufficient quantities) should attract the audit and filing consequences, while money which comes from a private source need not do so unless the private source so requires. I certainly have to agree that private foundations function in the highest public interest, but I think that is a different point.

With regard to membership fees, Bill 54 contemplates regulations which will determine what is meant by soliciting from the public. To my mind, a membership fee should not be included but should rather be treated as something between the member and the incorporated association. Mr. Slatter's point that the question should be clearly answered is well taken.

His point that receipt of funds on a fee for service basis should not bring about soliciting association status is quite right. It may be that the ultimate draftsman should do something to make sure that fees are excluded. However, to my mind it is enough to say that it is only receipt of "a grant or similar financial assistance" which qualifies, as a fee for service seems to me to be quite outside those words.

Incorporation

First, I should make a general statement of what the Institute conceives to be the purpose of the threshold tests which have to be met before an association can be incorporated under Bill 54. (See pages 15-18 of Report No. 49.)

The minimum requirement is the constraint on the distribution of income and property (or possibly only property) during the existence of the incorporated association. The real reason for the test is to make it unattractive for true business corporations to incorporate under Bill 54. The reason why it should be made unattractive is that the clash of economic interests characteristic of business corporations should be carried on within the BCA structure and not within the looser structure of Bill 54.

Having said that, I will not be terribly troubled if a few "business" corporations distort their structure or practices so as to incorporate and operate under Bill 54. As mentioned in Report No. 49, it would be quite possible for a group to incorporate under Bill 54 for a profit-making operation, and then liquidate and distribute the profits that way. I doubt that that game will be seen as being worth the candle, and I doubt that the game of stopping them is worth the candle, either.

Second, Bill 54 is intended to accommodate what Mr. Slatter refers to as "mutual benefit" organizations. Sporting and social clubs are an example. The members of such a club may receive a continuing stream of benefits from the club. So long as the benefits are not distributed in the form of cash or property, I see no reason in principle why the organization should not be able to incorporate under Bill 54. It is not likely that the elaborate structure of the BCA is necessary to hold the ring amongst the various interests involved in the club.

As noted in Report No. 49, the anomalies which would allow a business corporation to shelter under a statute designed for non-profits exist today and have existed for a long time. I do not think that they have created any evil which must be rectified.

It seems to me that sections 5, 6 and 19 of Bill 54 leave it open to have a "mutual benefit" incorporated association. The prohibition is against declaring a dividend and distributing income and property.

If the "mutual benefit" is to be money rather than the services of the clubhouse, then it may indeed be necessary to resort to section 78(2). If the purpose of the incorporated association is to give financial assistance, then its articles of incorporation can say so and the assistance can be given. This will accommodate the "mutual benefit" groups who want to make money payments, so long as the payments are "financial assistance".

I do not think that section 78(2)(a) reduces the restriction in section 5(a) to mere verbiage. Section 5(a) really prohibits such things as general distributions. Section 78(2) is intended to allow an incorporated association to carry out its purposes, which may include assistance to one or more members. I suppose that it is true that an incorporated association could so contrive its purposes under section 78(2) as to allow a general distribution, but I do not think that many will adopt the subterfuge of saying that their members need financial assistance when they don't. Ultimately, if a few are so anxious to escape the BCA that they contrive a way of sheltering under Bill 54, I will not be unduly troubled.

In the result, I think that the scheme of Bill 54 will tend to attract, on the mutual benefit side, organizations which are not in business for gain in a sense which would make the BCA structure the only appropriate structure, and I think that any form of drafting which would keep our sheep entirely uncontaminated by the occasional goat would probably cause more trouble than it would be worth.

Mr. Slatter's point about section 6(1)(b) is quite right. If people want to turn the kind of handsprings he suggests, they will be able to do so. However, it seems to me that anyone who is going to want to make continuing distributions of capital is likely to find the BCA more attractive.

For similar reasons, I am not too concerned about section 6(1)(c), which allows financial assistance in the case of a single constraint incorporated association. If the members have agreed to articles which have purposes which include giving financial assistance to members, I think that they can be left to live with that. I think that I would say the same even with regard to section 6(2)(d), though the principle behind the double constraint association is that money which goes into the association should be used only for the purposes for which the association is incorporated. Here, while admitting the possibility of abuse, I think that I would say that allowing the financial assistance which is provided for in the articles of incorporation is necessary to enable some useful incorporated associations to come under Bill 54, and I would be inclined to leave it at that.

What Mr. Slatter is saying at the bottom of page 2 of his letter, I think, is that there may be some existing non-profits which do not at present have a double constraint in their constitutions, so that upon dissolution section 20(b) of Bill 54 would apply, and the property would be divided equally among the members. This may not be appropriate for a non-profit with benevolent or charitable objects, as it may not have been contemplated that property would go to those who happen to be shareholders at the time of liquidation.

Mr. Slatter's solution is to include a provision that the court should have power on liquidation to order that the assets of the non-profit go to objects similar to the objects of the non-profit, if that appears to have been the overall intention of the members and founders.

Certainly, what Mr. Slatter suggests is the right policy. The only question is whether it is necessary.

If the non-profit already has in its memorandum or articles of association (if it is a Part 9 company), or in its application for incorporation (if it is a society), then section 20(a) of Bill 54 will apply, and the assets will go for the designated purposes.

If a Part 9 company or a society has not said anything in its constitution, I am doubtful about retroactively putting in a provision through Bill 54. In many cases that would be the thing to do. In others, it might not. My inclination would be against Mr. Slatter's general solution, but I do not mean to say that adopting it would be indefensible.

I think that what I would do is to change section 20(a) so as to read "in accordance with its articles or *by-laws*". The reason is that a Part 9 company may have a prohibition against distribution to its members in its articles of association (which become by-laws under Bill 54), and a society may have such a provision in its by-laws (which continue to be by-laws under Bill 54). Section 20(a) as presently drafted does not say that the property should be distributed in accordance with such a prohibition.

I do not think that it is necessary to impose an absolute ceiling on the value at which a share in a non-profit association can be transferred. The specific example which the "fair value" share transfer provision contemplates is the golf or sports club. I do not see any public interest in preventing (to take a personal example) a shareholder in the Mayfair Golf Club from surrendering his share and being paid the fair value for it. The right to receive the services of the golf club has value, and if the club is liquidated, the value of the assets will go to those who are shareholders at the time of liquidation. As I have said earlier, I do realize that a person who sets his mind to it can contrive a way of getting under Bill 54, but I do not think that keeping a few devious minded people out of it outweighs the disadvantages of restricting harmless activity on the part of those who come in. I do not think that Part 9 of the Companies Act would keep such people out, and I do not think that the loophole has caused significant problems.

I think that section 6(1)(b) is all right. What it does is to allow the articles of incorporation to contain a provision permitting the incorporated association to pay on surrender an amount that does not exceed the fair value of his membership. I think that this permits an incorporated association to set a dollar ceiling, so long as it does not exceed fair value.

I see no objection to having section 6(2)(b) apply to section 5(a) incorporated associations. Probably, the reason why it applies only to the double constraint incorporated association is that that is where it seems likely to be desirable to get property from one incorporated association to another. I am rather doubtful that there will be many cases in which a subsidiary single constraint incorporated association will want to transfer property up to its holding incorporated association, but there does not seem to be a public policy against it.

Names

"Incorporated association" is undoubtedly rather clumsy. It does, however, communicate some quite precise information, and usage will, the Institute thinks, identify it specifically with the Volunteer Incorporations Act.

The Institute did think, and probably still does, that it is useful to tell the public that a particular entity is a non-profit rather than a business corporation. At the present time, societies incorporated under the Societies Act cannot use "limited" or "incorporated" and it seems to the Institute that there is enough use in that distinction to preserve it. Part 9 of the Companies Act also recognizes the distinction, as, under section 200(1), what the Registrar may do is to direct the association to be registered with limited liability without the addition of the word "limited".

The difficulty that the Institute saw with the use of "society" and "club" as the distinctive word in a non-profit's name is that either can be used by an unincorporated group. They therefore do not disclose the fact that an association is incorporated. Probably "foundation" would be recognized by most people as referring to an incorporated body, but I do not see that putting "IA" after it will be much more burdensome than putting "Inc.", and using "IA" will distinguish them from business corporations.

To this point, in the discussion of names, I would say that the policy recommended by the Institute is to look for a distinctive term which will give the information that the entity is incorporated and will distinguish it from a business corporation.

With respect to Mr. Slatter's comment about section 12(6) of the BCA and the requirement of English, French or a combination, I would have to say that the Institute did not really direct its mind to the question of "heritage languages", but uncritically followed section 10(6) of the BCA. I cannot speak for the Institute, but I personally would not see any policy reason to refuse the use of another language. The Registrar may very well have views on the question, and I would think that it would be necessary for indexing purposes to stick to the alphabet and arabic numerals, but apart from that kind of practical consideration, I do not, on reflection, see that there is any reason to forbid another language. This view is reinforced by the thought that there are corporate names which have no meaning at all, and that does not seem to bother anyone. While there might be some different considerations, it would seem to me that any change in the current requirement of English or French should be made in the BCA if it is going to be made in Bill 54.

Effect of Incorporation

Mr. Slatter has put his finger on a case in which policy has not been clearly thought through and discussed and as a result there is a fuzziness in Bill 54. I do not think it needs heroic measures to clarify the bill, but I suggest a change. First, I will go back to square one.

The limitation of a shareholder's or member's liability is fundamental to what our corporation law tries to achieve. Incorporation statutes, in one way or another, protect shareholders and members against having to pay their corporation's debts. Part of the protection is that a corporation is not allowed to use its corporation machinery to impose obligations on the members or shareholders.

There is another side, or partial side, to the coin. Many non-profit corporations have membership fees. There is nothing wrong with this, but the statute should not allow them to be used as an indirect means of getting around limited liability.

I think that the following should be the policy:

(a) a single constraint (section 5(a)) incorporated association should not be able to impose a fee or levy upon a member or shareholder in his capacity as member or shareholder. (This would leave it free to require a fee for service, such as the right to use an association's golf course or clubhouse.) The reason for the absolute prohibition is that it would be wrong in principle either to render a member or shareholder liable for payment personally, or to allow the incorporated association to confiscate the economic interest which a share or membership of a single constraint association may represent.

(b) a double constraint (section 5(b)) incorporated association should be able to impose a fee or levy, but the only consequence of non-payment should be that the membership can be terminated, that is, the member cannot be made personally liable. The reason in favour of allowing the imposition is that that is a way to finance a benevolent activity and it is also a way of purging the membership rolls of people who are not interested in the work of a benevolent association. I do not see any reason against allowing the imposition, as terminating a membership imposes no economic disadvantage to the member, and there is no reason to require a benevolent association to carry a member who does not carry his share of the common burden.

There is one small awkwardness, in that a double constraint incorporated association may have shares (in the case of a charitable foundation, for example), and it seems awkward to think of cancelling shares for non-payment of dues and pointless to try to establish for such cases an elaborate enforcement system which will never be of any use to anyone. My inclination would be to exclude double constraint incorporated associations which have shares from the power to impose fees, simply because it is not worth the complication necessary to confer the power.

I should point out that the policy I have outlined is my policy. The subject never did come to the Institute Board in any clear and pointed form and so was never clearly decided. I think that I will see whether the Board agrees with me, but it may be some time before I can do so, and the Task Force need not wait on this.

I should now turn briefly to the background law.

It is clear that a Companies Act company cannot impose a levy upon a member or shareholder as member or shareholder. This was established by the Supreme Court of Canada in *Edmonton Country Club* v. *Case* [1974] 4 W.W.R. 626. There the Country Club had tried to impose an annual levy on shareholders whether or not they used the clubhouse or golf course. The Supreme Court said that that was contrary to the principle of limited liability. The law relating other kinds of corporations is not quite as clear-cut (see, for example, *Hole* v. *Garnsey* [1930 A.C. 473 (H.L.)), but I think that there is no real doubt that the courts will not permit the confiscation by even a non-profit corporation of a member's economically valuable interest in the corporation.

Bill 54 incorporates most of Part 5 of the BCA. This includes BCA section 25(2), which makes shares non-assessable. So long as nothing else in Bill 54 takes away the protection, I am satisfied that if an incorporated association has shares, the shareholders are protected against assessments as shareholders. The question then is whether other provisions of Bill 54 do take away the protection. The only provision I am aware of which could possibly be said to do so is section 31(3), which I will discuss below, so that making that subsection inapplicable to incorporated associations with shares will ensure that no assessments can be made against shareholders as shareholders. I note that Mr. Slatter suggests that other sections contemplate assessments. I would be happy to be referred to these, and, if they exist they should be dealt with, but at the moment, I think that dealing with section 31(3) will solve this part of the problem.

I turn now to section 31(2) and 31(3) of Bill 54. (I am quite sure that Mr. Slatter's reference in the seventh line of page 4 of his letter to section 33(3) is intended to be a reference to section 31(3).)

Section 31(3) is not directed towards fees and levies. It is directed towards protecting members against being ejected from an incorporated association on a discretionary basis without a fair hearing. However, it does refer to "fees, dues or other similar levies" in terms which suggest that things of that kind can exist. If the question came before a court, no doubt a strong argument could be made that, whatever its purpose, section 31(3) gives legitimacy to "fees, dues and other similar levies".

Section 31(2) strengthens the suggestion that fees, etc., can be levied. It says that the by-laws may prescribe the circumstances in which a membership terminates or may be terminated. One common circumstances in which termination may be desirable is when a member does not pay dues, so that the general words may cover termination for non-payment of fees. On the other hand, section 31(2) weakens the suggestion that a member can be personally liable for fees, etc., as it talks only of termination of memberships, and section 31(3) refers back to it.

I do not see any real foundation in section 31(2) or section 31(3) (or, for that matter, elsewhere in Bill 54) for imposing personal liability on members for fees, etc. Given the strong bias of the common law against tampering with limited liability, I do not think that the courts will read such a foundation into Bill 54.

Having said that, however, I do think that Bill 54 should be changed so that section 31(2) and 31(3) do not refer to single constraint incorporated associations at all. This will not do any harm. I have suggested that single constraint associations should not be able to "terminate" memberships, and if there is no need for the "natural justice" requirement upon termination of membership for non-payment of fees if membership cannot be terminated. Oddly enough, it seems to me that the way to make section 31(3) inapplicable to single constraint associations is not to touch section 31(3) at all, but rather to change section 31(2). It will be noted that Section 31(3) applies only to functionaries who terminate memberships under powers conferred by by-laws under section 31(2). If section 31(2) applied only to double constraint associations, the reference in section 31(3) would be only to double constraint associations.

There then arises a question as to whether the power of a double constraint incorporated association to levy a fee should be clarified. Given Bill 54 as it now stands, with section 31(3) continuing to apply to double constraint associations, it can be argued, as I have already said, that Bill 54 does authorize fees, etc. But that argument is by no means sure of acceptance. If a double constraint association is to be able to levy fees, Bill 54 should say so. This could be done by making it clear in section 31(2) that, if the articles of incorporation of an incorporated association contain a provision referred to in section 5(b), its by-laws may provide for the termination of memberships upon the failure of members to pay such fees, dues or levies.

In the result, I think that section 31(2) and 31(3) of Bill 54 should read as follows (changes being in italics):

(2) *If*

(a) the articles of an incorporated association contain a provision referred to in section 5(b, and

(b) the incorporated association does not have a capital stock divided into shares,

the by-laws may

> *(c)* confer on the directors or members, or any committee of directors or members, power to terminate a membership for reasons prescribed by the by-laws, and
>
> *(d) provide that a membership terminates upon non-payment of fees, levies or similar dues prescribed by the by-laws and under such other circumstances as the by-laws may prescribe.*
>
> (3) Except in the case of termination for non-payment of fees, dues or other similar levies and termination due to lapsing of time, a director, member or committee acting under subsection (2)*(c)* must observe the rules of natural justice.

It seems to me that it would then be clear that there would be no imposition of personal liability on a member or shareholder of any incorporated association, and that there would be no confiscation of the interest of a member or shareholder of a single-constraint incorporated association. If that is right, I think that Mr. Slatter's policy concerns would be met without more.

Returns

The Institute's view has been that it would be better to get into place a statute which is suitable for the general run of non-profit associations which now incorporate under the Companies Act and the Societies Act. Then, it might very well be a useful exercise to look at other kinds of non-profits. I certainly would see no objection to applying to Private Act corporations the provisions mentioned by Mr. Slatter, but I would not really want to do it without consulting those involved and without seeing what else there is in Bill 54 that might usefully apply.

Membership

The Institute has not thought about or discussed with anyone the extension of the provision about natural justice to "disciplinary actions" other than termination. It is one that, even in its present form, seems to have caused concern, and I would be reluctant to see it extended without consultation and consideration.

With regard to the incorporation of parts of the BCA under section 34, the Institute is of the view that it would be better not to add the length and complexity to Bill 54 which would be involved in writing out the parts of the BCA mentioned in the section. We are not so concerned in this area about those who wish to operate without legal advice. We would expect to find that those who have chosen to incorporate with share capital under the Companies Act will have done so with legal advice and for reasons which indicate some degree of complexity in their affairs. For such people, we do not think that the additional trouble in going to the Business

Corporations Act will be too significant. My own personal view is that the provision about shares is exceptional and that Bill 54 need not encourage people to use them.

Mr. Slatter is right in saying that the provisions in Part 5 of the BCA which he mentions are inconsistent with the letter and spirit of Bill 54. Something should be done about it. I think that it would be enough to add to the list of exceptions in section 34(a) the provisions which he mentions and possibly some others. Alternatively, it might be possible to describe as a class the provisions which are not incorporated. I think that for the moment it would be enough for the Task Force to note that there is a drafting problem which should be resolved. I do not think that there is any policy problem.

With regard to the non-assessibility of shares under Part 5 of the BCA, I do not see that this is likely to be a problem for non-profits with share capital. Such non-profits up to this point have had to register under the Companies Act and, while the Companies Act does allow for the sale of shares with some remaining liability attached, I would doubt very much that non-profits have made use of this device. I think that my view would be that the kind of non-profit associations that want shares can continue to do without the power to assess levies on members as members.

With regard to par value shares, it is quite true that at present a company under the Companies Act can have such shares, and under the BCA provisions which would be incorporated by section 34 of Bill 54, shares would have to be no par value. My difficulty is that I cannot see any usefulness for par value shares. I have already indicated above that I do not think that there should be a restriction on the turnover of shares in a non-profit to the par value rather than the fair value, which seems to me to detract from the very flexibility which non-profit associations with share capital should have.

I do not think that BCA section 26 is inapplicable. Protection of creditors through depletion of assets seems to be as desirable for non-profit associations as business corporations.

With respect to "banking" shares, the provisions of sections 42 to 49 of the Companies Act seem to me to be much more restrictive than the BCA provisions, and since section 34 of the BCA would apply to a Companies Act company now, I am not sure that I see Mr. Slatter's problem. If it is the application of section 31(3) of Bill 54, I have dealt with that above by suggesting that section 31(3) should not apply to associations with share capital.

I do not think that I follow Mr. Slatter's point about surrender, near the top of page 6. If there is share capital, section 35(1) of the BCA will apply. The result is that a member of a share capital association will be able to surrender a share under BCA section 35(1), while a member of any other association will be able to resign under section 33 of Bill 54.

With regard to Part 6, I do not have any difficulty with the general incorporation. The whole of the Part is incorporated by sections 34 and 79 of Bill 54. Mr. Slatter is right in saying that there are a couple of bits that should be excluded, and the Task Force might make a note along the line suggesting above with regard to the incorporation of Part 5. Again, I do not think that it is in the interests of the great mass of users of the Volunteer Incorporations Act to face them with the voluminous provisions of Part 6 of the BCA, or any non-profit counterpart, and I think that it is better to leave the actual users of shares, who will be small in number and are likely to be more sophisticated, to move over to the other statute.

With regard to section 184 of the BCA, the Institute does think that it has a part to play. It will apply under section 34 of Bill 54 only to incorporated associations with shares. It is theoretically possible that a volunteer incorporation with shares will be a double constraint corporation, and, indeed, that is likely to be the case in a charitable foundation. Given, however, the case of a golf club or something like that, shares may have a distinct economic value, and, indeed, Mr. Slatter's previous comments have related to getting out that value. The notion of economic value therefore, in my view, is not in conflict with the concept behind section 5(a). I am not troubled about having section 184 apply to a double constraint association under section 5(b), as the fair value of the share will be zero and I do not see that it is really worth going to the trouble of saying that the section 184 procedure will apply only to a section 5(a) association.

With regard to the existing Part 9 company that provides that its shares can only be traded for $5.00, that would be a factor to take into account in deciding what fair value is. However, fair value would include the consideration of what the shareholder would get on dissolution, and if somehow or other he is being oppressed by a fundamental change in the operation, it does not seem to me at all unjust that he, like a business corporation shareholder, should have access to some form of justice.

With regard to expanding section 184(1)(b), we seem to have changed sides, as I would be inclined to leave it as it is. With regard to the point about "subject to sections 185 and 234", again, I think that it should be noted that the drafting should be checked, assuming that these provisions are going to go forward. I remain reluctant to add into Bill 54 the text of the complex provisions of section 184.

With respect to the possibility of schisms, the Institute Board has not considered the issue. At the staff level, we did not think that the proposed new statute should enter into a new minefield of that kind. Trying to provide legislative guidelines for the court as to when a church has ceased to adhere to the doctrine of those who founded it is not only difficult but likely to offend a great many religious organizations. Certainly, it should not be contemplated without carefully prepared and extensive consultation, as it would mean a very significant change in the existing law. It is my own view that Bill 54 should go along with letting people choose their objects and keeping within them.

Directors

In merely providing that a "director" means a person occupying the position of director "by whatever name called", Bill 54 follows the pattern of the other corporation statutes. It seems to me that the definition is sufficient, as, if the question arises, one would look at a given incorporated association and see who is doing what directors usually do. The point is merely one of drafting, as I think the present intention of the bill is pretty well what Mr. Slatter suggests.

With regard to the appointment, rather than the election, of directors, I have previously suggested to the Task Force that section 44 of Bill 54 should permit the appointment of directors.

With respect to different classes of directors, each with different powers and rights, I take it that people are doing what they want to do under the existing legislation, and it seems to me enough that Bill 54 be brought into line with the Societies Act by allowing for the appointment of directors and that section 48(1) of Bill 54 allow the by-laws to deal with powers of directors. Then, as noted, section 1(1)(f) contemplates directors with different names. While I suppose that it would not do any harm to add another provision, I think that those who want to do so will be able to adopt the more complex arrangements suggested by Mr. Slatter without adding to Bill 54.

Contracts Overriding By-Laws

I have elsewhere given reasons why I do not think that the unanimous shareholder agreement should be transported across to volunteer organizations. Mr. Slatter, while not going that far, does not suggest that Bill 54 should provide for the unanimous shareholder agreement as such.

What he does do is to suggest that an incorporated association might entrench in its constitution one or more of a specific number of restrictions on its activities.

This is an interesting idea, and, in my view, less open to serious objection than the unanimous shareholder agreement. I am still inclined against it. It goes beyond what, in Mr. Slatter's example, the foundation really needs, which is to see that its money is applied properly. That, it seems to me, can be dealt with by contract and by trust arrangement, without affecting other activities of the incorporated association.

It should, I think, be possible to determine what the constitution of an incorporated association is by seeing what is on file with the Registrar of Corporations. That consideration would at least require such a contract to be filed with him. So that the effect of the whole constitution could be ascertained, I would think that the contract should substitute provisions in the articles and by-laws so that it would not be necessary to interpret possibly conflicting instruments.

Even if that point is met, I think that I am still against the idea. It seems to me that flexibility is the hallmark of corporate constitutions, and that freezing things so that the members cannot change them is likely to lead to unfortunate results. This is particularly so, since times change, foundation grants are spent, and organizations want to go on to other things. No doubt foundations would be reasonable and would give up their contractual rights when those rights are no longer necessary, but in my experience, people forget to do things, and people are not always available and willing to take time to clear up hangovers from earlier times.

My feeling is therefore to leave this sort of thing to contracts which will tend to apply to the specific circumstances and be exhausted when those circumstances have ceased to exist.

I note that Mr. Slatter says that provisions of the kind he mentions are already quite common. Presumably, therefore, those who enter into them are able to cope under existing legislation without directly affecting the constitutions of incorporated associations, and my inclination is to leave it that way. I think that the main benefit the outsider would get from the provisions he suggests would be the ability to apply to the court for an order that the incorporated association comply with its constitution, including the contract, and it does seem to me that there are other ways of dealing with the situation without departing from the independent nature of a corporate body and the principle of member control.

With regard to section 48(2)(a), I agree with Mr. Slatter that the wording should not be mandatory, and that the subsection should commence "The by-laws *may* authorize the directors ...".

Section 50

I would be adverse to leaving it to individual organizations to define what is a conflict of interest, and what is a material contract. The purpose of binding guidelines is to protect organizations against conflicts of interest on the parts of those who control it, and conferring powers of that kind by by-law would, I think, be open to abuse. In Mr. Slatter's example, if there is a contest which cannot be rigged and the prizes are small, then I doubt that a director or officer, by participating, would be entering into a "material contract". If the sole function of the association is to hold contests, and if the prizes are of a very significant value, then it seems to me that those who design the rules should not be able to take advantage of them for significant personal advantage. This is a policy question.

Section 51

With respect to directors who compete and directors who take advantage of opportunities, I do not see that the non-profit aspect of an incorporated body should make a difference. I think that the present law, both under the Companies Act and the Societies Act, has much the same consequences as those which Mr. Slatter attributes to section 51 of Bill 54, and it seems to me that that is, on the whole, a good thing. This is a fairly important policy decision.

Financial Affairs

I have no comment on Mr. Slatter's suggestion of a dollar limit for the appointment of an auditor. This subject is under extensive discussion by the Task Force.

With regard to waiving the audit, it seems to me that it is better to have legal requirements, preferably by regulation, which will balance the need for protection against misuse of money, on the one hand, and the cost of obtaining audit protection on the other. If, instead of general rules, there is to be a discretion to be exercised in an individual case, then I think that it should be conferred by regulation which gives guidelines, and it seems to me that it should be some one official, such as the Registrar, who exercises the discretion. On the whole, I would stay with regulations of general application.

With respect to independence of the auditor, it would certainly not offend me if a chartered accountant who is a board member does the audit, or has it done by his firm. The reason for the Bill 54 provision is that the Institute of Chartered Accountants thought that this is not a proper arrangement. If a change such as that suggested by Mr. Slatter is made, I suppose that it would have to deal with the other two recognized accounting groups as well.

I think that Mr. Slatter's comment on section 78(4) (his first comment on section 78 having been dealt with elsewhere) raises a good point. Section 78(4) is brought across from BCA section 42(4). In the BCA, it is appropriate, because the people who will receive the financial assistance are very likely to be true insiders. The purpose of section 78(2)(a) being to allow an incorporated association to provide assistance to members of a group which the incorporated association is set up to assist, the situation is different, and it becomes inappropriate. On looking at the purposes for which financial assistance can be given under section 78(2), I personally would be inclined to go along with the deletion of the subsection. I will take this up with the Institute's Board, but, again, the Task Force need not wait for this.

I do not agree that section 78(2) does away with section 5(a), particularly read in conjunction with sections 18 and 19. Certainly, financial assistance can be given to members if the articles say so and if the members qualify. This is different from distributing profits and income, and I think that it is clear enough that articles which provide for distribution of profits and income would not be valid. Finally, it seems to me that a prohibition against distributing profits and income is a sufficient hurdle to place before people who want to incorporate under the proposed statute, that I do not see any kind of "mutual benefit" organization which could not incorporate under the proposed statute, and that if a few devious-minded organizations managed to come under it when they should not, I would not be too concerned.

Fundamental Changes

The Institute regarded the change from a double constraint incorporated association to a single constraint incorporated association to be so fundamental that it should not occur, even with court approval. With no one present to give the other side, it has in my experience been rather easy to obtain court orders changing objects, and it does not seem to me that it would be good policy to allow it here. The reason is that people will have put in time, money or both on the understanding that the resources gathered together by the incorporated association will be used entirely for purposes other than personal gain of the members. It seems to me that it would be something like a breach of faith to allow the members at a given time to obtain the resources gathered together over a period of time. I suppose that the weakest case, from this point of view, is that of the charitable foundation where (whatever tax law may have to say on the subject) there is not the same strong objection to the withdrawal of the funds by the person who put them in. Even here, however, it seems to me that the law should compel the use of the resources for non-gain purposes once they have been formally committed, the situation being analogous to a declaration of trust.

I suppose that I do not really see a policy objection to bringing a BCA corporation under the Volunteer Incorporations Act, so long as, at the time of bringing it under, the BCA corporation has one of the two constraints provided for in section 5. The Institute had not originally intended any continuance provisions at all, as this did not seem to be the sort of thing that non-profit corporations are likely to want to do. We were however persuaded that there may be an occasional need to migrate from one province to another, or, more likely, to migrate to or from federal jurisdiction. No suggestion for continuance of a BCA corporation was received, and the Institute did not turn its mind to the subject. Again, I will try this on the Institute's Board.

Investigation

I would be extremely doubtful about allowing anyone to apply for an investigation who is not a member, whether registered or beneficial.

Making the investigation power available requires a balancing of interests. In the past, and in the present insofar as non-profit corporations are concerned, if a corporation mistreats an outsider, the outsider can sue the corporation and obtain a judgment if he has cause to sue. The investigation power is a powerful engine which can get inside the company, examine its records, compel its people to give information, and so on, and this can be done with a reasonable prospect that there will be no adverse effect on the applicant. It is true that the court has a discretion and should only order the investigation if there is quite a bad smell, but it still puts people in jeopardy and is a power which, in my opinion, should be made available only to those who are members of the organization itself.

It is true that the BCA makes it possible for "security holders" to apply for an investigation. It is also true that "security holder" is defined in terms which can be read as including an ordinary trade creditor. The Institute, when it recommended the adoption of the BCA, was reluctant about including any kind of creditor in the class which could apply for an investigation. We said at that time "we do not think that as a general rule a creditor should be able to apply for an investigation; however, the holder of a bond or debenture which can be converted into shares has a legitimate interest in the management of a corporation, and we can see also a case in which there is grounds for suspicion that a corporation (though still solvent so that it cannot be put into bankruptcy) has been set up as part of a scheme to defraud investors". We did not think that those reasons applied to incorporated associations and therefore did not include creditors, whether in general or only the holders of securities of kinds usually traded, should have a right to apply for an investigation.

It should be noted that the Registrar has a power under section 94(1)(c) of Bill 54, to apply for an investigation. If there is an apparent abuse of an incorporated association's powers, the Registrar can make the application, and his legal right to make it gives him a standing from which he can try to persuade associations to change their ways without going to the extent of applying for the investigation. We doubt that this power will be often used, but it seems to us that that is where the protection of interests outside the association itself should rest. A donor has no personal interest, and, again, it seems that a public official is the one to protect the public interest.

With regard to section 126, the comparable BCA provision (BCA 234) does not allow a creditor to apply as of right to bring or defend an action on behalf of the incorporated association, as the use of the word "registered" in the definition of "complainant" in section 231 is restrictive (see for example *First Edmonton Place Limited* v. *315888 Alta. Ltd.* (1988) 60 Alta. L.R. (2d) 122 (McDonald J.)). The Institute thinks it inappropriate to go further than to give the court discretion to allow an outsider to apply.

Bill 54 does not expressly do away with the Attorney General's power to supervise charities. It is possible that a court would take the conferring of status on the Registrar to exclude the status of the Attorney General, but I rather doubt it. If the Institute had to make a choice, it would opt for the Registrar, on the grounds that the Attorney General is far removed from regulation of non-profit corporations and is unlikely to use his supervisory powers. The Registrar receives complaints and it seems reasonable that he should be the official with power to intervene. His ability to do so depends on the provision of some sort of investigatory establishment and access to legal advice, which need not be extensive unless banditry becomes rampant. We would expect that his standing in the Act would give him standing to have incorporated associations explain themselves to him, with a view achieving results without necessarily going to court. I would not see any real need to give notice to two government officials.

I think that I would personally agree to adding into section 110(1)(b) of Bill 54 a reference to sections 5 and 6. I suppose that if that is done, sections 18 and 19 should also be included. I doubt that the atomic bomb of dissolution should be made available for minor infractions of the statute. I have not checked out this addition with the Institute's Board.

I would not recommend the expansion of section 111(1)(a) of Bill 54 to allow a person who has made a donation to apply for dissolution on the grounds of oppression, unfair prejudice or unfair disregard of interests. Again, it does not seem to me that a donor has an "interest", and that the Registrar (plus, possibly, the Attorney General) should be the guardian of the public interest.

With respect to section 114, it would certainly be in order to incorporate a reference to the court's powers to order distributions of property. This is a drafting, and not a policy, matter.

With respect to section 20(b), it would be a very significant policy change to say that members of an incorporated association with a single constraint are not entitled to the assets on dissolution. This would be a very significant policy decision, and would depart very significantly from the Institute's recommendations and from Bill 54.

Giving notice to donors would only be appropriate if specific remedies are to be given to donors. The Institute's policy would be against this.

The "fair value" provision in section 120 would only apply in a case in which property rather than money is to be distributed to the members of an incorporated association, and a member disagrees with this. As there is an economic interest, the Institute does not see it incongruous to have it valued so that, on the one hand, a majority which wishes to distribute property can do so, while, on the other, a member who thinks otherwise can bail out of the scheme.

Securities Act

The Institute does not see anything in Bill 54 which would attract a liability which would not exist at the moment. We made an inquiry some considerable time ago from the Securities Commission and did not receive an answer from them.

Yours sincerely,

W.H. Hurlburt

WHH/cr